(27,467)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 712.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

ADDIE SPEIGHT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1-3 Third and Fourth Districts.

No. 100.

SPEIGHT

against

TELEGRAPH CO.

(From Halifax.)

Before Kerr, J. Plaintiff Appealed.

Be it remembered that on the 16th day of February, 1918, Addie Speight sued and prosecuted out of the Superior Court of Halifax County a summons in these words:

Summons.

NORTH CAROLINA,
Halifax County:

In the Superior Court.

ADDIE SPEIGHT

against

WESTERN UNION TELEGRAPH COMPANY.

The State of North Carolina to the Sheriff of Halifax County, Greeting:

You are hereby commanded to summon Western Union Telegraph Company, the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the county of Halifax at the courthouse in Halifax, N. C., on the second Monday after first Monday in March, 1918, and answer the complaint which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within that term the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action, to be taxed by the clerk.

4 Herein fail not, and of this summons make due return.

Given under my hand and seal of said county this 16th day of February, 1918.

S. M. GARY,
Clerk Superior Court of Halifax County.

1—712

Received February 16, 1918. Served February 17, 1918, by reading to and leaving copy of within summons with E. F. Carr, agent defendant Company, Weldon, N. C.

J. A. HOUSE,
Sheriff Halifax County,
By S. H. GREEN,
D. S.

Complaint.

The plaintiff, with leave of court, hereby files the following amended complaint:

1. That the defendant is a corporation duly chartered and organized under and by virtue of the laws of the State of New York, and is doing a general telegraph business in the State of North Carolina.

2. That on the 24th day of January, 1918, at 9:45 a. m., at Greenville, N. C., the following telegram, charges prepaid, was delivered to the defendant for transmission and delivery to the plaintiff at Rosemary, N. C.:

7 N D 0 6 Greenville, N. C., 9:45 a. m.
1-24-18.

Mrs. Addie Speight,
Rosemary, N. C.

Father died this morning. Funeral tomorrow, 10:10 a. m.
APPIE O. SMITH.

3. That the foregoing message was delivered to the plaintiff at Rosemary, N. C., on the 24th day of January, 1918, with the date changed from January 24th to January 23, 1918, making the telegram read, "Father died this morning, i. e. January 23d). Funeral tomorrow (i. e. January 24th).

5 4. That the said message was changed in transmission and delivery, thereby misleading the plaintiff and causing her to fail to attend the funeral of her dead brother mentioned in the telegram.

5. That the plaintiff would have attended the funeral if she had received the message as originally delivered.

6. That believing that her brother died January 23d, and would be buried on the 24th, as stated in the message which she received, and which had been negligently and carelessly changed, thereby depriving her of the opportunity of attending his funeral, which she would have attended if the same had been correctly transmitted and delivered.

7. That by reason of the negligence and carelessness of the defendant as alleged in the complaint, the plaintiff has suffered great

mental pain and anguish and has been endamaged in a large amount to wit: in the sum of three thousand dollars.

Wherefore the plaintiff prays judgment against the defendant for the sum of three thousand dollars and for the costs of the action, to be taxed by the clerk.

PIPPIN & GREEN,
Attorneys for the Plaintiff.

Answer.

The defendant Company, answering the complaint of the plaintiff, alleges and says:

1. That section 1 of the complaint is admitted.

2. That section 2 of the complaint is not true, and the same is denied.

3. That section 3 of the complaint is not true, and the same is denied.

4. Answering section 4 of the complaint this defendant says that it has no knowledge or information thereof sufficient to form a belief as to the truth thereof and therefore denies the same.

5. In answer to section 5 of the complaint this defendant says that it has no knowledge or information thereof sufficient to
6 form a belief as to the truth thereof and therefore denies the same.

6. That section 6 of the complaint is not true, and the same is denied.

6½. That section 7 of the complaint is not true, and the same is denied.

7. And further answering said complaint for a separate defense, this defendant says that if there was delivered to this defendant a message such as that referred to in section 2 of the complaint, such message was in interstate message and was transmitted in the usual, customary, and necessary route from Greenville, N. C., to Richmond, Va., a regular relay point of the defendant Co., and relayed and transmitted thence to Norfolk, Va., another regular relay point, and from Norfolk, Va., transmitted to Roanoke Rapids, N. C.

8. And for a further separate defense this defendant says if there ever was delivered to this defendant a message such as referred to in section 2 of the complaint, such message was delivered and was accepted by the defendant subject to the terms of a certain contract in writing, the same being printed on the blank upon which said message was written, the same contract being as follows:

"To guard against mistakes or delays, the sender of a telegram should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram

rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for the nondelivery, of any unrepeated telegram, beyond the amount received for sending the same;
nor for mistakes or delays in the transmission or delivery, or
7 for nondelivery, of any repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in case for delay arising from unadvoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

"3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

"4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or town. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him such delivery at a reasonable price.

"5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers he acts for that purpose as the agent of the sender.

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

"7. Special terms governing transmission of message under the classes of messages enumerated below shall apply to mes-
8 sages in each of such respective classes in addition to all the foregoing terms.

"8. No employee of the Company is authorized to vary the foregoing."

And it appears therefrom that it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message beyond the amount received for sending the same; and that the said message was an unrepeated message and defendant was not directed or requested to repeat the same, and that all the defendant received in exchange for its obligation in respect to said message was the sum of forty cents, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

9. That such message was an interstate message to be sent from a point in the State of North Carolina, to wit: the town of Greenville, and to be transmitted in the usual, customary and necessary route from Greenville, N. C., to Richmond, Va., a regular relay point of the defendant company, thence relayed and transmitted to Norfolk, Va., another regular relay point of the defendant company, thence transmitted to Roanoke Rapids, N. C., and was as such interstate commerce.

10. That by the defendant's established rules, regulations and tariffs, as the same were on file with the Interstate Commerce Commission prior to the 24th day of Feb., 1918, and are still maintained and established, messages are classified among other classifications into "repeated" and "unrepeated"; a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the
9 case of unrepeated messages defendant assumes no liability beyond the amount received for sending the same while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract); and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendants, at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

11. That by Act of Congress approved June 18, 1910 (36 Stat. L., 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or

acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

12. That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications, established by the defendant as above described, and with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

10 By reason of which and of all the premises, the defendant says that the stipulation in the contract subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event exceed the sum of — cents, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of North Carolina or any other State, so that the defendant ought not to be liable in any event, in this action beyond the sum of forty cents, with interest from the 24th day of February, 1918.

13. And further answering the complaint of the plaintiff for a further separate defense, the defendant says that the said message if it ever was received as alleged was an interstate message, and the measure of damage is governed exclusively by the laws of the United States, and the defendant's rights and liabilities under and by virtue of the laws of the United States cannot be varied or interfered with either by the laws of the State of North Carolina, or any other State, and the defendant expressly pleads the laws of the United States in bar of any recovery by the plaintiff in this action, and avers that to permit a recovery for the damages claimed in this action would be in contravention of article 1, section 9, subdivision 3, of the Constitution of the United States, and of the Acts of Congress passed in pursuance thereof, and the Special Act approved June 18, 1910. (36 Stat. L. 539.)

14. And further answering the complaint this defendant says that if there was delivered to this defendant a message such as that referred to in section 2 of the complaint, such message transmitted as aforesaid was an interstate message and as such interstate commerce, and the liability of such this defendant is only as is fixed and determined by the laws of the United States and the decisions of its courts applicable thereto, and this defendant is advised and alleges that no recovery can be had in such a case for mental pain and suffering or mental anguish, and that the element of damages for mental anguish is not recognized by the laws of the United

11 States, and for this reason, the plaintiff is not entitled to recover anything because of mental pain and suffering or mental anguish.

And for a further separate and partial defense the defendant alleges:

15. Defendant repeats all the allegations of the first separate defense herein.

16. The defendant further alleges that as more fully appears from the contract in writing, the same being printed on the blank upon which said message was written and fully set out in section 8 of this answer, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

17. That such message was an interstate message to be sent from a point in the State of North Carolina, to wit: the town of Greenville, and to be transmitted in the usual, customary and necessary route from Greenville, North Carolina, to Richmond, Virginia, a regular relay point of the defendant Company, thence relayed and transmitted to Norfolk, Virginia, another regular relay point of the defendant Company, thence transmitted to Roanoke Rapids, North Carolina, and was as such interstate commerce.

18. That by the defendant's rules, regulations and tariffs, as the same were on file with the Interstate Commerce Commission prior to the 24th day of February, 1918, and are still maintained and established, messages are classified among other classifications, into messages valued by the senders thereof at fifty dollars, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and tariffs for the transmission and delivery of messages are based on the as-
12 sumption that the message is valued at fifty dollars or less, and that in the case of a message valued at a specified sum in excess of fifty dollars, it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

19. That, by the Act of Congress, approved June 18, 1910 (36 Stat. L. 559), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power

to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

20. That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 24th day of February 1918.

13 Wherefore, the defendant prays judgment that having fully answered the complaint of the plaintiff that the plaintiff take nothing by her writ, that the defendant go without day and recover of the plaintiff the cost of the action to be taxed by the Clerk.

W. E. DANIEL,
Attorney for the Defendant.

Reply.

The plaintiff replying to the answer of the defendant says:

1. That the allegations of article 7 of the answer are untrue and are denied.

2. That the allegations of article 8 of the answer are untrue and are denied.

3. That the allegations of article 9 of the answer are untrue and are denied.

4. That the allegations of article 10 of the answer are untrue and are denied.

5. That the plaintiff has no knowledge or information with respect to the matters and things set out in section 11 of the answer, but says that even if so the Act of Congress mentioned has no application to the present case.

6. That the allegations of Article 12 of the answer are untrue and are denied.

7. That the allegations of article 13 of the answer are untrue and are denied.

8. That the allegations of article 14 of the answer are untrue and are denied.

9. That the allegations of article 15 of the answer are untrue and are denied.

10. That the allegations of article 16 of the answer are untrue and are denied.

11. That the allegations of article 17 of the answer are untrue and are denied.

14 12. That the plaintiff has no knowledge or information as to the matters and things set out in article 18 of the answer, and therefore, denies the same.

13. That the plaintiff has no knowledge or information as to the matters and things set out in article 19 of the answer and therefore denies the application to the present case.

14. That the allegations of article 20 of the answer are untrue and are denied.

1. Further replying to the defense of the defendant, the plaintiff says that the telegram set out in the complaint was not sent by the necessary, convenient and prompt route from Greensville, N. C., to Roanoke Rapids, when sent to Richmond, and thence to Norfolk, thence to Roanoke Rapids, but this route was selected by the defendant to impress upon the message an Interstate character, and was sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently circumventing the law of the State of North Carolina, and to acquire the protection of the Federal law set out in the answer as a defense to this action, thereby attempting to evade liability for its negligence.

That the most convenient, easy, direct and prompt route for a message from Greenville, N. C. to Roanoke Rapids, N. C., is direct from Greenville to Weldon, thence to Roanoke Rapids. That the telegraph wire which the defendant used to transmit the message to Richmond passes through the Weldon offices on its way to Richmond, and again on its way to Roanoke Rapids from Norfolk.

2. Replying further to article [?] of the answer, the plaintiff says:

(*a*) That the stipulation contained in subdivision of article 8 of the complaint is an unreasonable attempt on the part of the defendant to limit its liability for negligence, that the same is contrary to public policy, is unreasonable and void;

(*b*) That with respect to the stipulation contained in subdivision 2 of article 8 of the complaint, the plaintiff says that
15 said stipulation is an unreasonable attempt on the part of the defendant to limit its liability for negligence; that the same is contrary to public policy, and is unreasonable and void, and for which reasons said stipulations or restrictions are not binding upon the plaintiff. That the message set out in the complaint is an Intra-State message.

Wherefore, plaintiff demands judgment as set out in her complaint.

GEO. C. GREEN,
J. P. PIPPEN,
Attorneys for Plaintiff.

Issues.

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the laws of North Carolina?

Answer: Yes.

2. Was the message negligently changed in transmission by the defendant?

Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover?

Answer: $100.

Judgment.

This action coming on to be heard at this term of the Court before Honorable John H. Kerr, judge presiding, and a jury, and being heard upon allegation and proof and the following issues having been submitted to the jury:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the laws of North Carolina?

2. Was the message negligently changed in transmission by defendant?

3. What damage, if any, is the plaintiff entitled to recover and the jury having responded to the first issue "Yes," to the second
16 issue "Yes," and to the third issue "$100" and the Court being of the opinion that as a matter of law in no view of the testimony is the plaintiff entitled to recover:

Now on motion of W. E. Daniel, attorney for the defendant, it is ordered, adjudged and decreed that the verdict herein be and the same is set aside as a matter of law, that the plaintiff be and she is hereby nonsuited, and that the defendant go without day.

JOHN H. KERR,
Judge Presiding.

Judgment tendered by defendant; signed; plaintiff excepts. Notice of appeal given in open court, to Supreme Court. Plaintiff allowed until January 10, 1919, to file case on appeal; defendant allowed 20 days thereafter to serve countercase or exceptions; plaintiff allowed to appeal in forma pauperis.

Plaintiff's Statement of Case on Appeal.

NORTH CAROLINA,
Haliax County:

In the Superior Court, November Term, 1918.

(Title of Cause.)

The plaintiff, appellant files the following statement of case on appeal.

This was an action tried at the November Term, 1918, of the Superior Court of Halifax County, before John H. Kerr, Judge, and a jury.

The Clerk of the Superior Court will copy the complaint and answer.

The following issues were submitted to the jury:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

Defendant objects, objection overruled, defendant excepts.

2. What damages, if any, is the plaintiff entitled to recover?

The plaintiff offered in evidence telegram marked "Exhibit A," which is as follows:

17 Greenville, N. C., 1-23-18.

To Mrs. Addie Speight,
Rosemary, N. C.

Father died this morning. Funeral tomorrow.
APPIE O. SMITH.

MRS. ADDIE SPEIGHT:

My name is Mrs. Addie Speight. I live at Rosemary. Lived there January 24, 1918. I received the telegram marked "Exhibit A" on the 24th day of January, 1918, from Appie O. Smith. I received it between 11 and 12 o'clock. John Smith was the person mentioned in the telegram. My brother. I did not get the telegram in time to attend the funeral on the afternoon of the 24th. My brother and I were fond of each other. I would have attended the funeral if I had gotten the message in time. If this message had been dated Jan. 24th, when I received it, I would have had ample time to have gone to the funeral. I thought from the telegram that he died on the 23d, and was going to be buried on the 24th, and that I had received the telegram too late to get there. I suffered a great deal of mental suffering or pain because I did not get to see the last of him—to see him for the last time—and to be present at his funeral. I worried a great deal. It caused me a great deal of

worry and pain because I could not be present at the funeral of my brother.

Cross-examination:

John Smith was my brother. I received the telegram between 11 and 12 o'clock. It stated that the funeral was on tomorrow and I thought the funeral would be that day. I thought it useless for me to wire back. I did not request the funeral to be put off. A train leaves Weldon for Greenville about 3.30 in the afternoon and it would put me in Greenville about 7 o'clock the same day. I did not wire that I had just gotten the telegram and ask them if
18 they could not postpone the funeral. I heard from my brother Thanksgiving before. We were together. He died January, 1918. I did not have any letters from him since that time. I knew he was in bad health. I corresponded with another brother and kept in touch with this brother. I never had any letters from relatives until after I got the telegram. In ten days I got a letter from my living brother. I have had no communication with any member of my dead brother's immediate family since his death. Only a clipping from a newspaper sent me. I did not write to any member of the family at all. I did not write to Appie O. Smith. I have never written her a letter. I have never gotten in communication with any member of his immediate family. After John Smith was dead I did not write a single letter to a single person of his immediate family. I turned the telegram over to Mr. Green in two days. I went to Mr. Green. I called up my lawyer in two days after my brother died, but I did not write a letter to his family.

C. E. WILLIAMSON, being duly sworn testified as follows:

I am a telegraph operator for the Coast Line. Since Dec. 25, 1909. The most direct route from Greenville, N. C. to Rosemary, N. C., for a telegraph message would be Greenville to Weldon and Weldon to Roanoke Rapids. I should say the route from Greenville to Weldon and Weldon to Roanoke Rapids would be the most convenient, direct and prompt route for the message to travel from these two points. In sending this message from Greenville to Richmond, then from Richmond to Norfolk and from Norfolk to Roanoke Rapids, it was bound to pass through Weldon office both times.

Cross-examination:

I worked for the Western Union Telegraph Co. at Battleboro for four years. At the same time I was an operator for the Coast
19 Line. In Weldon I work at the block office. I would say the most direct route from Greenville to Roanoke Rapids would be by Weldon, but it might not be the quickest. There is no difference between the quickest and the promptest. (Paper is handed witness.) I said in that paper that the route by Weldon was the most direct route but not the quickest. I mean under the circumstances that it is not the quickest but the most direct. The

circumstances are as the wires are arranged now. If Greenville wanted Weldon she would get Richmond to tell Weldon to answer Greenville. They would have to call Richmond first and ask Richmond to call Weldon to tell Weldon to answer the Greenville call. This has been the custom ever since I commenced to work, I know. Nearly ten years. It is not practicable for Greenville to work with every office in N. C. It works with Richmond. That is the relay point. They send to Richmond. Richmond sends Weldon's business back to Weldon. Greenville sends to Richmond and Richmond sends to Weldon. This has been the custom ever since I have known anything about it. They would get to Roanoke Rapids by sending to Richmond, Richmond to Norfolk, Norfolk to Roanoke Rapids. It could be handled at Weldon. Weldon is a relay point for the Kinston Branch for Oak City and Tillery, but not for Greenville. Wire No. 111 runs to Weldon from Greenville. All of them run through the Weldon office for test purposes. If there should be trouble with the Weldon wire it could cut-in on another wire. A relay office is for the purpose of handling messages from a great many places in such a way as to systematically distribute them and avoid congestion. I did not mean that Weldon was the promptest route to get the message through to Roanoke Rapids under the present circumstances. These circumstances have been in existence ever since I have been an operator and have known anything about it. The way by Richmond would be the quickest way, that is, with the wires arranged as they are now, and they have been arranged that way ever since I have been an operator.

20 Redirect examination:

I say that Weldon is the relay office for Oak City and Tillery. The reason for the present method of transmitting messages via Richmond and Norfolk and back to Roanoke Rapids is because of the present arrangement of the wires. The Weldon office can cut in on wire No. 111, and any other wire that passes through Weldon. There is a wire from Weldon to Roanoke Rapids. Weldon can work direct with the Roanoke Rapids office. The wire runs from Norfolk to Roanoke Rapids and has to come through the same switchboard and you can cut in on it. It would be necessary to call Weldon and be told to cut in on the wire. Unless this is done, Weldon would not know that Weldon was being called. They could ask Norfolk to call and tell Weldon to cut-in.

Recross-examination:

Norfolk is a relay point for Roanoke Rapids. This has been the custom ever since Roanoke Rapids was established as an independent office. This has been for two years.

Plaintiff rests.

The defendant moved to nonsuit the plaintiff. The defendant's motion overruled; exception by the defendant. This is defendant's Exception No. 2.

The defendant offers in evidence telegram marked "Exhibit A," which is as follows:

7 N DO 6
Greenville, N. C., 9.45 A. M.
Jan. 23-18.

Mrs. Addie Speight,
Rosemary, N. C.

Father died this morning. Funeral tomorrow.

APPIE O. SMITH.

1010 A.

21 The defendant offered in evidence tariff book of the defendant company, marked "Exhibit C" and the same is verbatim set out in defendant's case on appeal and it is agreed that the same may be referred to herein to save the burdensome cost of printing; also the certificate of Interstate Commerce Commission that the said tariff book was on file as required by law with the Interstate Commerce Commission; said certificate is dated February 16, 1919. The defendant offered in evidence the blank form of telegram showing on the back of same rules, marked "Exhibit D," and the same is verbatim set out in defendant's case on appeal, marked "Exhibit D," and it is agreed that the same may be referred to herein to save the burdensome cost of printing; and also the certificate of the Interstate Commerce Commission that the same is a true copy of a form received of the Western Union Telegraph Company February 20, 1917, and on file with the Interstate Commerce Commission; said certificate is dated February 25, 1918.

The original telegram marked "A" is on a form similar to the blank form marked "Exhibit D" with the same terms and rules on the back thereof.

It is agreed that the defendant has in all respects complied with the rules and regulations of the Interstate Commerce Commission under Act of Congress and amendments thereto regulating interstate communication by telegraph.

Mr. E. M. KILPATRICK testified as follows:

My name is E. M. Kilpatrick; age 35; residence, Norfolk, Va.; occupation Chief Operator, Western Union Telegraph Company. I have been connected with the Western Union Telegraph Company 15 years. I have been in the telegraph business 17 years. Chief operator 4½ years. I am acquainted with the route adopted by the Telegraph Company for handling messages between Greenville, N. C. and Roanoke Rapids, N. C. There are two direct routes from Greenville—through Richmond to Norfolk to Roanoke Rapids, or
22 from Greenville to Norfolk to Roanoke Rapids. It has to come through Norfolk in either case. It can be sent from Greenville to Richmond or Greenville to Norfolk. It is not possible under the system adopted by the Western Union Telegraph Company for a message between those points to go other than through Norfolk.

The purpose of a relay office is to systematically distribute the business that has to be transferred from one line to another, and there has to be a regularly equipped office for that purpose. We have regular appointed relay offices. Norfolk is the regularly appointed relay office for Roanoke Rapids. Norfolk works direct with Roanoke Rapids. The wire from Norfolk to Roanoke Rapids goes through the Weldon office, but for test purposes only. It is not operated at Weldon. The wires from Greenville, N. C. to Richmond, Va., passes through Weldon. That is a regular local for the Weldon office and also for the Greenville office. Weldon receives its messages from Richmond over the same circuit. Weldon is not a relay office. There is only one operator there. The usual and customary route is from Greenville to Richmond to Norfolk and thence to Roanoke Rapids. It could have come to Norfolk direct from Greenville, but Richmond handles practically all of Greenville's business and is its principal outlet. Richmond does not work with Roanoke Rapids. This system of relay points mentioned has been in effect as long as I have been in the business—for at least 17 years. I made an investigation of the message involved in this case. The message was received from Richmond in the Norfolk office at 9:58 a. m. Jan. 24th, and was transmitted from the Richmond office to Norfolk and sent to Roanoke Rapids from Norfolk at 10:12 a. m. the same date. It is impossible for every office to work direct with every other office.

J. L. BUNDY testified as follows:

I am a Western Union Telegraph operator at Richmond. Been in the employment of the Western Union about 7 years. I was in Richmond when the message referred to in this action was
23 received. The message was received by me from Greenville at 9:15 a. m., and was transmitted to Norfolk, another relay point. Richmond is the distributing point for Greenville. Greenville is located on wire running from Norfolk to Kinston and also on wire passing Weldon to Richmond. Greenville can work with either. Roanoke Rapids has to work with Norfolk. Greenville, to get the message through in the promptest way would send to Richmond, Richmond to Norfolk, and Norfolk to Roanoke Rapids. Greenville can work with Norfolk on the Norfolk-Kinston wire, but this would not be the quickest and most convenient route. The quickest way to get a message through is by way of Richmond to Norfolk, Norfolk to Roanoke Rapids. Norfolk is the outlet for the messages sent to Roanoke Rapids. Richmond is in the State of Virginia, and Greenville is in the State of North Carolina. The operator at Weldon could only tell when Greenville is calling Richmond by cutting in on the wire, which he would hardly ever do. Unless this was done, Weldon would not know that Greenville was calling Richmond or that it was trying to call Weldon. The wires come in Weldon instead of being run on poles, are brought into the Weldon office in a loop, and this loop runs through the switchboard. This is done for test purposes, and in case of storms or trouble you can tell where the trouble has occurred by testing. Sometimes the

wires are broken and you can patch a bad wire on a good one. The operator at Weldon has a plug that you can take and plug and cut in on any wire he wishes to, but ordinarily he would not do that, unless he was called and told to cut in or listen in. There are a good many of these wires strapped to the switchboard in Weldon as I said for test purposes and have no instrument attached to them, and the only way that you can hear what is passing on them would be for the operator to cut in with this plug. The wire from Greenville to Richmond is the regular local wire for Greenville and Weldon. Weldon receives its messages over the same circuit. Richmond has been the relay point for points in this section ever since I have been
24 there. It is impossible to send direct from Greenville to Roanoke Rapids. Greenville has no Roanoke Rapids wire. Greenville would send to Richmond and Norfolk to get to Roanoke Rapids. Greenville could, of course, send the message by way of Norfolk without going through the Richmond office but it would have to use wires that carry a large volume of business and it would really take longer to get the message through that way than it would by the way of Richmond. The Western Union estimates the load its wires all carry and it has arranged its wires into Richmond in such a way as to carry the load without congestion. Richmond is equipped for doing this relay work in the quickest possible way. It can be done more promptly than by way of Norfolk to Roanoke Rapids. I should say that from Greenville to Richmond, to Norfolk to Roanoke Rapids is the promptest, most convenient and necessary route. The company has created these relay points at intervals to facilitate the sending and distributing of messages and to dodge congestion. The outlets for Greenville are as I have said, Norfolk and Richmond, and in order to get messages through in the quickest possible manner, it is necessary to send to Richmond to be handled there. There they are transmitted to Norfolk quicker than they could be sent on local wires. These local wires are same time used jointly by the railroad company. Norfolk is in the State of Virginia. It is not possible on these local wires to work direct with every other point in North Carolina, because they haven't got the circuits going through the switchboards. You can only work with what goes through the board. If Weldon was made a relay point for all of these different points in North Carolina, it would take 4 operators. There are about 12 wires coming through the Weldon office, so that would be 12 circuits. An operator can work three wires. Weldon would then be working 4 wires into Richmond instead of one, outside of what would come in from Norfolk. It would mean a great deal more work. In some of these small places an operator works for the railroad company and for the Western
25 Union. The local wire would have to handle the business for both. Relay points are done to expedite business. It is necessary to have these concentration or relay points to handle the volume of business from a great many small offices, so that it can be distributed systematically. Relay points are gotten up by the company for the quick delivery of messages. Greenville is a one operator

office, it has two outlets; one at Richmond and one at Norfolk. Roanoke Rapids has only one outlet, Norfolk.

Cross-examination:

I could not testify that this was a message delivered to the company at Greenville. It has the appearance of being one. The mistake occurred after it left Greenville. The wire on which this message went from Greenville to Richmond passed through the Weldon office. The wires are arranged so that they can be cut in. The wires are arranged by the company so as to best take care of the volume of business; every wire has to carry its load. By load I mean the number of messages it can handle with dispatch. About 15,000 messages come through the Richmond office in the course of 24 hours. About 7,000 or 8,000 are handled through the Norfolk office and 40 or 50 locally by the Weldon office in the course of 24 hours. It depends a great deal upon the character of the message as to its delivery. Messages of the character mentioned are often given the preference over others. If urgent it might be rushed through sooner than some others.

Redirect:

The reason that this large number of messages pass through the Richmond office and the Norfolk office is that they are relay points. They have something like 240 wires. If these messages were not relayed it would create congestion at other places. These relay points are for the purpose of dodging congestion—to take advantage
26 of congestion. Without relay points there would be confusion and congestion and these relay points were created to take care of this.

Mr. CHAS. HOTZE testified:

I am the operator that handled that message. I sent it just as it is.

Mr. H. T. BROCK testified:

I was an operator at Roanoke Rapids in January, of this year. I received the message from Norfolk. The relay point for Roanoke Rapids. I worked with Norfolk. I got the message from Norfolk because that was the regular relay point laid out by the company at which to handle their business. This has been done ever since the office was established at Roanoke Rapids in November, 1915, I think.

Cross-examination:

I don't exactly remember what Mrs. Speight said. It has been some time ago. I remember a part of it all right. As well as I remember, she said it was Thanksgiving—the past Thanksgiving a year ago that she saw her brother. The message came to me changed to the 23d. I do not know exactly where the change occurred. It

was sent to me from Norfolk, dated the 23d. I received it from Norfolk as the 23d.

It is admitted that the message was not repeated by the sendee. It is classified as an unrepeated message.

At the close of all the testimony the defendant again moved that plaintiff be nonsuited. Motion overruled; defendant excepts, and this is defendant's third exception.

Exception No. 3.

Judge's Charge.

His Honor charged the jury as follows:

Gentlemen of the jury, the plaintiff's name is Mrs. Addie
27 Speight. This is an action brought by Mrs. Addie Speight against the Western Union Telegraph Company to recover damages for and on account of mental anguish which she alleges she suffered on account of the Western Union Telegraph Company's negligence and carelessness in failing to transmit a message which was sent her by her niece from Greenville, N. C., to Rosemary, N. C. The plaintiff contends, gentlemen of the jury, that some time on the 24th day of January that her alleged niece sent her a message from Greenville in this State to her place of residence in Rosemary in this county and in this State, and she contends that the Telegraph Company negligently changed the date of the message; that it was sent on the 24th, but that it was made to read the 23d when it was received by her, and she contends that when she received the message that it was dated the very date that her said niece said her brother was to be buried, and she contends she was unable after she received it to get or to catch a train, or to get to Greenville in time to pay the last tribute to him and to see him before he was buried. She contends, gentlemen of the jury, that if the message had been sent and had been received dated the 24th, as it was sent, that she could have gotten there in time to have attended his funeral on the 25th. She contends, gentlemen of the jury, that if the date had not been changed she would have been able to have taken a train at Weldon and to have gotten in Greenville in time to have seen her brother buried. She contends that by reason of this negligently sending of this message that she was unable to go to her brother's funeral, that she suffered great physical and mental pain; that she grieved on account of it a great deal, and she contends, gentlemen of the jury, that you ought to compensate her for this pain and mental suffering. She contends, gentlemen of the jury, that this message ought to have gone direct from Greenville to Rosemary; that it could have been sent first to Weldon and then relayed at Weldon and sent
28 on to Rosemary. She contends, gentlemen of the jury, that this message was transmitted through the State of Virginia in order to fraudulently evade any liability which the Company might incur on account of any negligence which might occur in the transmission of messages, and she contends that you ought to find

that this message ought to have gone direct from Greenville to Rosemary by way of Weldon, and she contends that you ought to find that the date of the said message was changed in such a manner that it made it appear to arrive in her hands on the very day of her brother's funeral, and she contends that she suffered great mental anguish on account of this negligence on the part of the defendant company, and she contends, gentlemen of the jury that you ought to find that she has been endamaged in a large amount, in the sum of $3,000 or some other large amount. She contends, gentlemen of the jury, that you ought to award her compensation for her sufferings and that she ought to recover damages for the great physical suffering and mental anguish which she underwent by reason of the negligence and carelessness of the defendant company.

Now, gentlemen of the jury, on the other hand the Western Union Telegraph Company contends entirely different about this matter. The company contends that it received this message and transmitted it the usual, customary way, the proper way to send the message to the sendee, to Mrs. Speight, the plaintiff in this action. The company contends, gentlemen of the jury, that it first sent the message through Weldon to Richmond because that was the relay office of this section for these messages; that all messages going out of Greenville were either sent to Richmond, Va., or to Norfolk, Va., and relayed and distributed to other points. The defendant contends that this message went by way of Richmond, and that it was sent then to Norfolk, Va., because Norfolk, Va., was the point from which the message was relayed to Roanoke Rapids or Rosemary. The defend-

20 ant contends that it sent the message the usual, customary way and the way that messages of that character had been sent for long years—a number of years—and the defendant contends, gentlemen of the jury, that it is not liable because under the Act of Congress, the Federal Laws of the United States, they are not liable for any mental anguish which might occur to the sender of a message or the sendee of a message, by reason of the negligent delivering of messages or failure to deliver as they should have delivered it. The defendant contends, gentlemen of the jury, that you ought not to find that they transmitted this message through State of Virginia, or that this message was transmitted through the State of Virginia for the purpose of evading liability under the laws of the State of North Carolina; that they do not send messages routed in this way to fraudulently evade any laws of the State of North Carolina, but that they simply sent the message from Greenville to Richmond because that was the usual way to do it, the most convenient route, the promptest and best way in which to send it, and the way in which they had been sending messages to and from these points, from which points to be sent to various points, for a great length of time.

Now, they contend, that is the Western Union Telegraph Co., that if you should find that the defendant negligently transmitted the message and that in the transmission they changed the date in such a way that the sendee, the plaintiff who received the message, could not get to her brother's funeral; they contend that even if you

should find that, that you still ought not to find that they are liable for any amount of damages; that the relation between her and her brother was not so close; that this relation was not so devoted that she would suffer great pain or that she suffered great mental anguish by reason of not being able to attend the funeral of her brother. The Telegraph Company contends, gentlemen of the jury, that she has not seen her brother for more than a year and that she did not communicate with him; that she only got information from him and his family by corresponding with another brother, and the
30 company contends, gentlemen of the jury, that even if you should answer the first issue "Yes" against the Company, that you ought not to assume that she is entitled to recover any damages, and that you ought to find from the evidence that she did not suffer very much, and that she is not entitled to recover any damages whatsoever.

Now, gentlemen of the jury, three issues are submitted to me. The first is: "Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?" The Court charged you, gentlemen of the jury, that the burden is upon the plaintiff as to this issue to satisfy you by the evidence and by its greater weight that the message was sent out of this State for the purpose of fraudulently evading liability under the laws of the State of North Carolina in the event that any negligence occurred in the transmission or receiving of the message. I mean by the greater weight this, gentlemen of the jury, that the side upon whom the burden is put must outweigh the contentions of the other side, where the scales hang true and fair, one side must outweigh the other side ever so little, that is, the greater weight of the evidence upon one side must outweigh the evidence submitted by the other side. It may do this ever so little, but it must outweigh it some, the side upon whom the burden is put. So, if you are satisfied by the evidence and the greater weight of the evidence and much weight you must give the evidence—and you must take into consideration all of the circumstances surrounding the evidence; you can take into consideration the manner and the character of the witnesses who testified about this matter; if you are satisfied from the evidence and by its greater weight, as I have defined greater weight to you, that the defendant Company sent this message out of the State of North Carolina through the State of Virginia for the purpose of fraudulently evading liability under the laws of the State of North Caro-
lina, you will answer the first issue "Yes," but if you are not
31 so satisfied, then the Court charges you to answer this issue "No." If you answer this first issue "No," you need not answer the other two issues. But if you answer it "Yes," you can come to the second issue—to the other two. The Court charges you that naturally the company handles a great many of these messages, and that on account of what appears upon its face it required to use greater care in sending and receiving it than they would for ordinary messages or than they would under ordinary circumstances.

Now you come to consider the second issue, which is: "Was the message negligently changed in transmission by the defendant?" The burden is also put upon the plaintiff here, that is upon Mrs. Speight, to satisfy you by the evidence and its greater weight that this message was negligently changed; that is to say, the date of it was changed. If you so find, gentlemen of the jury, that it was negligently changed in the transmission, then you must answer this second issue "Yes"; if you do not so find from the evidence, then answer the second issue "No."

Having answered these two issues, gentlemen of the jury, you would come to consider the third issue. The burden is upon the plaintiff to show that this message was negligently changed by the defendant, and further upon the plaintiff to show you by the evidence and by its greater weight, that on account of the negligently changing of the date of this message the plaintiff was endamaged; that the suf fered mental anguish and was greatly damaged thereby, and the plaintiff must satisfy you as to this by the evidence and by the greater weight of the evidence as I have defined greater weight to you.

Now, gentlemen of the jury, when you come to consider this last issue: "What damage, if any, is the plaintiff entitled to recover?" this negligence on the part of the defendant must not only have caused this suffering complained of by the plaintiff in this action, but it must have been the proximate cause of it. Negligence is the failure to do what a man of ordinary prudence would have done under existing circumstances; or of not doing what an ordinary careful man would not have done under the circumstances. Now, gentle-
32 men of the jury, if you should find that this message or the date of this message was negligently changed in transmission by the defendant and you answer the second issue "Yes," then you must go further and find if the plaintiff suffered by reason of this negligence and if so, how much was she damaged, and if you should find that she has been endamaged, what compensation, if any, she is entitled to recover. Did she suffer mental anguish? Did she suffer great physical pain and mental anguish in not being able to attend the funeral of her dead brother? Was this mental anguish because of not being able to go to the burial of her brother? If her failure to attend the funeral occasioned regret or caused her some worry that would not be mental anguish. I will try to define mental anguish for you. Mental anguish is suffering in a high degree, in an extreme degree, not merely just being disappointed, and if she did not suffer in a high degree, if her suffering was not of a severe nature, and it must be a mental pain of high degree—she would not be entitled to recover, but if you find that the plaintiff did suffer in such a great degree, that she suffered great physical and mental pain and anguish by reason of not being able to see her brother and in not being able to attend her brother's funeral, then you would go further and say how much you find from the evidence she is entitled to recover, not what you feel about the matter. You will be governed by the evidence in the case and give her a fair and reasonable compensation for what mental suffering she experienced, if you find by the greater weight of the evidence that by reason of the negligence of the defend-

ant in failing to deliver the message as it was sent she suffered great physical and mental pain.

Now, gentlemen of the jury, I charge you that the law says that you ought to scrutinize very carefully the evidence of an interested witness; you must scrutinize the appearance of the witness, the manner in which he or she testifies, their conduct when on the witness stand, but the rule goes further and says that if you do this, and if you believe that the interested witness has told the truth, then
33 you are to give just as much weight to their testimony as you would to that of a disinterested witness.

You are, gentlemen of the jury, the judges of what the evidence is in this case, you are not, gentlemen of the jury, compelled to take what the counsel for the plaintiff may recall was the evidence, you are not compelled to consider what counsel for the defendant may state as his recollection of the evidence in the case; and if the Court should undertake to tell you what his recollection is you are not bound to consider that; it is for you to say how much weight you will give to the evidence. Now, gentlemen of the jury, the Court has no opinion about this case, as to whether certain facts have been proved or not. The Court charges you that the fact that one of these parties is an individual and the other a corporation should not prejudice you. When people come into court they should stand upon the same plane. This case is important to the plaintiff and it is important to the defendant. You, gentlemen of the jury, are to take the evidence and weight it; you are the sole judges of what was the evidence, and you must be the judges of the consideration you will give it.

Now, gentlemen of the jury, take the case and see how you will answer these issues.

At the close of the plaintiff's testimony, defendant moved for nonsuit. Motion overruled and defendant excepts.

The following issues were submitted to the jury:

1. Was the message sued on, sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the laws of North Carolina?

2. Was the message negligently changed in transmission by the defendant?

3. What damages, if any, is the plaintiff entitled to recover?

And the jury having answered the first issue "Yes" and the second issue "Yes" and the third issue "$100," the plaintiff tendered the Court a judgment in favor of plaintiff according to the finding of the
34 issues as appears in the record. His Honor declined to sign the judgment and to this refusal to sign the judgment, the plaintiff excepts.

Exception No. 1.

His Honor signed the following judgment:

Judgment.

NORTH CAROLINA,
Halifax County:

In the Superior Court, November Term, 1918.

(Title of Cause.)

This action coming on to be heard at this term of the Court before Honorable John H. Kerr, Judge presiding and a jury, and being heard upon the allegation and proof and the following issues having been submitted to the jury:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

2. Was the message negligently changed in transmission by the defendant?

3. What damage, if any, is the plaintiff entitled to recover?

And the jury having responded to the first issue "Yes," to the second issue "Yes," and to the third issue "$100," and the Court being of the opinon that as a matter of law in no view of the testimony is the plaintiff entitled to recover:

Now, on motion of W. E. Daniel, attorney for the defendant, it is ordered, adjudged and decreed that the verdict herein be and the same is set aside as a matter of law that the plaintiff be and she is hereby nonsuited, and that the defendant go without day.

JOHN H. KERR,
Judge Presiding.

To the foregoing judgment plaintiff excepts and appeals to Supreme Court. Notice given in open court. By consent,
35 plaintiff is allowed until May 15, 1919, in which to file case on appeal. The defendant allowed until — to file counterase.

Grouping of Exceptions.

Exception No. 1.—Exception No. 1 is to the refusal of the Court to sign the judgment upon the issues found by the jury.

Exception No. 2.—Exception No. 2 is to the judgment and statement therein that "In no view of the testimony as a matter of law is the plaintiff entitled to recover in this action."

GEO. C. GREEN,
J. P. PIPPIN,
Attorneys for Plaintiff.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
Halifax County:

In the Superior Court.

I, Sterling M. Gary, Clerk of the Superior Court, for the county of Halifax, State of North Carolina, do hereby certify, that the foregoing is a full, true and perfect transcript of the record in the case wherein Addie Speight is plaintiff, and Western Union Telegraph Co., defendant, lately pending in said Court.

Witness my hand and official seal at office in Halifax Town, this 31st day of July, A. D. 1919.

STERLING M. GARY,
[SEAL.] *Clerk Superior Court.*

1–3 Third and Fourth Districts.

No. 101.

ADDIE SPEIGHT
against
WESTERN UNION TELEGRAPH CO.

(From Halifax.)

Before Kerr, J. Defendant Appealed.

Be it remembered that on the 16th day of February, 1918, Addie Speight sued and prosecuted out of the Superior Court of Halifax County a summons in these words:

Summons for Relief.

STATE OF NORTH CAROLINA,
Halifax County:

In the Superior Court.

ADDIE SPEIGHT
against
WESTERN UNION TELEGRAPH CO.

The State of North Carolina to the Sheriff of Halifax County, Greeting:

You are hereby commanded to summon Western Union Telegraph Co., the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court at

a court to be held for the County of Halifax at the courthouse in Halifax, N. C., on the 2d Monday after the 1st Monday in March, 1918, and answer the complaint which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint with- that term, the plain-
4 tiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the Clerk. Herein fail not and of this summons make du- return.

Given under my hand and seal of said county this 16th day of February, 1918.

S. M. GAPY,
Clerk Superior Court of Halifax County.

Received February 16, 1918.
Served February 17, 1918, by reading to and leaving copy of within summons with E. F. Carr, Agt. Defendant Co., Weldon, N. C.

J. A. HOUSE,
Sheriff Halifax County,
By A. H. GREEN,
D. S.

Complaint.

The plaintiff, with leave of court, hereby files the following amended complaint:

1. That the defendant is a corporation duly chartered and organized under and by virtue of the laws of the State of New York and is doing a general telegraph business in the State of North Carolina.

2. That on the 24th day of January, 1918, at 9.45 a. m., at Greenville, North Carolina, the following telegram charges prepaid were delivered to the defendant for transmission and delivery to the plaintiff at Rosemary, North Carolina:

7 N D O 6

Greenville, N. C., 9.45 a. m.
1-24-18.

Mrs. Addie Speight,
Rosemary, N .C.:

Father died this morning. Funeral tomorrow, 10.10 a. m.
APPIE O. SMITH.

3. That the foregoing message was delivered to the plaintiff at Rosemary, N. C., on the 24th day of January, 1918, with the date changed from January 24th to January 23, 1918, making the
5 telegram read: Father died this morning (i. e., January 23d). Funeral tomorrow (i. e., January 24th).

4. That the said message was changed in transmission and delivery, thereby misleading the plaintiff and causing her to fail to attend the funeral of her dead brother mentioned in the telegram.

5. That the plaintiff would have attended the funeral if she had received the message as originally delivered.

6. That, believing that her brother died January 23d, and would be buried on the 24th, as stated in the message which she received, and which had been negligently and carelessly changed, thereby depriving her of the opportunity of attending his funeral, which she would have attended if the same had been correctly transmitted and delivered.

7. That by reason of the negligence and carelessness of the defendant as alleged in the complaint, the plaintiff has suffered great mental pain and anguish and has been endamaged in a large amount, to wit: in the sum of three thousand dollars.

Wherefore the plaintiff prays judgment against the defendant for the sum of three thousand dollars and for the costs of the action to be taxed by the clerk.

PIPPIN & GREEN,
Attorneys for the Plaintiff.

Answer.

STATE OF NORTH CAROLINA,
Halifax County:

In the Superior Court.

ADDIE SPEIGHT, Plaintiff,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant company, answering the complaint of the plaintiff, alleges and says:

1. That Section 1 of the complaint is admitted.

2. That Section 2 of the complaint is not true and the same is denied.

6. 3. That Section 3 of the complaint is not true and the same is denied.

4. Answering Section 4 of the complaint, this defendant says that it has no knowledge or information thereof sufficient to form a belief as to the truth thereof, and therefore denies the same.

5. In answer to Section 5 of the complaint, this defendant says that it has no knowledge or information thereof sufficient to form a belief as to the truth thereof, and therefore denies the same.

6. That Section 6 of the complaint is not true and the same is denied.

6½. That Section 7 of the complaint is not true and the same is denied.

7. And, further answering said complaint, for a separate defense this defendant says that if there was delivered to this defendant a message such as that referred to in Section 2 of the complaint, such message was an interstate message and was transmitted in the usual, customary and necessary route from Greenville, North Carolina. to Richmond, Virginia, a regular relay point of the defendant company, and relayed and transmitted thence to Norfolk, Virginia, another regular relay point, and from Norfolk, Virginia, transmitted to Roanoke Rapids, North Carolina.

8. And for a further separate defense this defendant says if there ever was delivered to this defendant a message such as referred to in Section 2 of the complaint, such message was delivered and was accepted by the defendant subject to the terms of a certain contract in writing, the same being printed on the blank upon which said message was written, the said contract being as follows:

To guard against mistakes or delays, the sender of a telegram should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face,
this is an unrepeated telegram and paid for as such, in con-
7 sideration whereof it is agreed between the sender of the telegram and this company as follows :

1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for the non-delivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery or for the non-delivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

3. The company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the company's office in towns of 5,000 population or less, and within one

mile of such office in other cities or towns. Beyond these limits the company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him such delivery at a reasonable price.

5. No responsibility attaches to this company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

8 6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission.

7. Special terms governing transmission of message- under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.

8. No employee of the company is authorized to vary the foregoing.

And it appears therefrom that it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond the amount received for sending the same; and that the said message was an unrepeated message and defendant was not directed or requested to repeat the same, and that all the defendant received in exchange for its obligation in respect to said message was the sum of forty cents, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

9. That such message was an interstate message to be sent from a point in the State of North Carolina, to wit, the town of Greenville, and to be transmitted in the usual, customary and necessary route from Greenville, North Carolina, to Richmond, Virginia, a regular relay point of the defendant company, thence relayed and transmitted to Norfolk, Virginia, another regular relay point of the defendant company; thence transmitted to Roanoke Rapids, North Carolina, and was as such interstate commerce.

10. That by the defendant's established rules, regulations and tariffs, as the same were on file with the Interstate Commerce Commission prior to the 24th day of February, 1918, and are still 9 maintained and established, messages are classified, among other classifications, into "repeated" and "unrepeated;" a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the case of unrepeated messages defendant assumes no lia-

bility beyond the amount received for sending the same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract); and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message the defendants, at all the times mentioned, made and still make an additional charge equal to one-half of the unrepeated message rate.

11. That by Act of Congress approved June 18, 1910 (36 Stat. L., 539), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

12. That said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge the higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all the premises, the defendant says that the stipulation in the contract subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of — cents, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of North Carolina or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of forty cents, with interest from the 24th day of February, 1918.

13. And further answering the complaint of the plaintiff, for a further separate defense the defendant says that the said message, if it ever was received as alleged, was an interstate message, and the measure of damage is governed exclusively by the laws of the United States, and the defendant's rights and liabilities under and by virtue of the laws of the United States cannot be varied or interfered with either by the laws of the State of North Carolina or any other State, and the defendant expressly pleads the laws of the United States in bar of any recovery by the plaintiff in this action, and avers that to

permit a recovery for the damages claimed in this action would be in contravention of Article 1, Section 9, Subdivision 3, of the Constitution of the United States and of the Acts of Congress passed in pursuance thereof and the Special Act approved June 18, 1910 (36 Stat. L., 539).

14. And further answering the complaint, this defendant says that if there was delivered to this defendant a message such as that referred to in Section 2 of the complaint, such message transmitted as aforesaid was an interstate message and as such interstate
11 commerce, and the liability of this defendant is only such as is fixed and determined by the laws of the United States and the decisions of its courts applicable thereto, and this defendant is advised and alleges that no recovery can be had in such a case for mental pain and suffering or mental anguish, and that the element of damages for mental anguish is not recognized by the laws of the United States, and for this reason the plaintiff is not entitled to recover anything because of mental pain and suffering or mental anguish.

And for a further separate and partial defense the defendant alleges:

15. Defendant repeats all the allegations of the first separate defense herein.

16. The defendant further alleges that, as more fully appears from the contract in writing, the same being printed on the blank upon which said message was written and fully set out in Section 8 of this answer, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

17. That such message was an interstate message to be sent from a point in the State of North Carolina, to wit, the town of Greenville, and to be transmitted in the usual, customary and necessary route from Greenville, North Carolina, to Richmond, Virginia, a regular relay point of the defendant company; thence relayed and transmitted to Norfolk, Virginia, another regular relay point of the defendant company; thence transmitted to Roanoke Rapids, North Carolina, and was as such interstate commerce.

18. That by the defendant's rules, regulations and tariffs, as the same were on file with the Interstate Commerce Commission
12 prior to the 24th day of February, 1918, and are still maintained and established, messages are classified, among other classifications, into messages valued by the senders thereof at fifty dollars, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and

tariffs for the transmission and delivery of messages are based on the assumption that the message is valued at fifty dollars, or less, and in case of a message valued at a specified sum in excess of fifty dollars it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

19. That by the Act of Congress, approved June 18, 1910 (36 Stat. L., 559), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

20. That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

13 By reason of which and of all the premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 24th day of February, 1918.

Wherefore the defendant prays judgment that, having fully answered the complaint of the plaintiff, that the plaintiff take nothing by her writ; that the defendant go without day and recover of the plaintiff the cost of the action to be taxed by the clerk.

W. E. DANIEL,
Attorney for the Defendant.

Reply.

The plaintiff, replying to the answer of the defendants, says:

1. That the allegations of article 7 of the answer are untrue and are denied.

2. That the allegations of article 8 of the answer are untrue and are denied.

3. That the allegations of article 9 of the answer are untrue and are denied.

4. That the allegations of article 10 of the answer are untrue and are denied.

5. That the plaintiff has no knowledge or information with respect to the matters and things set out in Section 11 of the answer, but says that even if so, the Act of Congress mentioned has no application to the present case.

6. That the allegations of article 12 of the answer are untrue and are denied.

7. That the allegations of article 13 of the answer are untrue and are denied.

8. That the allegations of article 14 of the answer are untrue and are denied.

9. That the allegations of article 15 of the answer are untrue and are denied.

10. That the allegations of article 16 of the answer are untrue and are denied.

14 11. That the allegations of article 17 of the answer are untrue and are denied.

12. That the plaintiff has no knowledge or information as to the matters and things set out in article 18 of the answer, and therefore denies the same.

13. That the plaintiff has no knowledge or information as to the matters and things set out in article 19 of the answer, and therefore denies the application to the present case.

14. That the allegations of article 20 of the answer are untrue and are denied.

1. Further replying to the defense of the defendant, the plaintiff says that the telegram set out in the complaint was not sent by the necessary, convenient and prompt route from Greenville, N. C., to Roanoke Rapids, when sent to Richmond, and thence to Norfolk, thence to Roanoke Rapids, but this route was selected by the defendont to impress upon the message an interstate character, and was sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently circumventing the law of the State of North Carolina and to acquire the protection of the Federal law set out in the answer as a defense to this action, thereby attempting to evade liability for its negligence.

That the most convenient, easy, direct and prompt route for a message from Greenville, N. C., to Roanoke Rapids, N. C., is direct from Greenville to Weldon, thence to Roanoke Rapids. That the telegraph wire which the defendant used to transmit the message to

Richmond passes through the Weldon office on its way to Richmond, and again on its way to Roanoke Rapids from Norfolk.

2. Replying further to article 8 of the answer, the plaintiff says:

(*a*) That the stipulation contained in subdivision 1 of article 8 of the complaint is an unreasonable attempt on the part of the defendant to limit its liability for negligence; that the same is contrary to public policy, is unreasonable and void.

15 (*b*) That with respect to the stipulation contained in subdivision 2 of article 8 of the complaint, the plaintiff says that said stipulation is an unreasonable attempt on the part of the defendant to limit its liability for negligence; that the same is contrary to public policy and is unreasonable and void, and for which reasons said stipulations or restrictions are not binding upon the plaintiff. That the message set out in the complaint is an intrastate message.

Wherefore plaintiff demands judgment as set out in her complaint.

GEORGE C. GREEN &
J. P. PIPPIN,
Attorneys for Plaintiff.

Jury.

(1) R. E. Shearin, (2) W. D. Hux, (3) Charles Speed, (4) J. J. Willie, (5) C. R. Atwood, (6) W. L. Simmons, (7) J. C. Jenkins, (8) D. B. Bryan, (9) James Butts, (10) C. H. Sullivan, (11) H. M. Pittman, (12) J. M. Bunch.

Issues.

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?
Answer: "Yes."

2. Was the message negligently changed in transmission by the defendant?
Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover?
Answer: "$100."

Judgment.

This action coming on to be heard at this term of the court before Honorable John H. Kerr, Judge presiding, and a jury, and being heard upon allegation and proof, and the following issues having been submitted to the jury:

1. Was the message sued on sent out of the State of North
16 Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

2. Was the message negligently changed in transmission by the defendant?

3. What damage, if any, is the plaintiff entitled to recover?

And the jury having responded to the first issue "Yes," to the second issue "Yes" and to the third issue "$100," and the court being of the opinion that as a matter of law in no view of the testimony is the plaintiff entitled to recover;

Now, on motion of W. E. Daniel, attorney for the defendant, it is ordered, adjudged and decreed that the verdict herein be and the same is set aside as a matter of law, that the plaintiff be and she is hereby nonsuited, and that the defendant go without day.

JOHN H. KERR,
Judge Presiding.

Statement of Case on Appeal.

NORTH CAROLINA,
Halifax County:

In the Supreme Court, November Term, 1918.

Mrs. ADDIE SPEIGHT, Plaintiff,

against

WESTERN UNION TELEGRAPH CO., Defendant.

The defendant-appellant, the Western Union Telegraph Company, files the following statement of case on appeal:

This was an action tried at the November term, 1918, of the Superior Court of Halifax County before Judge John H. Kerr and a jury.

The Clerk of the Superior Court will copy complaint, answer and all papers in this action.

The following issues were submitted to the jury:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

Defendant excepts. Objection overruled. This is the defendant's first exception.

Exception No. 1.

17 2. Was the message negligently changed in transmission by the defendant?

3. What damage, if any, is the plaintiff entitled to recover?

The plaintiff offered in evidence telegram marked Exhibit "A," which is as follows:

1-24-28.

To Mrs. Addie Speight,

Rosemary, N. C.:

Father died this morning. Funeral tomorrow.

APPIE O. SMITH.

Mrs. ADDIE SPEIGHT, being duly sworn, testified as follows:

My name is Mrs. Addie Speight. I live in Rosemary. Lived there January 24, 1918. I received the telegram marked Exhibit "A" on the 24th day of January, 1918, from Appie O. Smith. I received it between 11 and 12 o'colck. John Smith was the person mentioned in the telegram. My brother. I did not get the telegram in time to attend the funeral on the afternoon of the 24th. My brother and I were very fond of each other. I would have attended the funeral if I had gotten the message in time. If this message had been dated January 24th, when I received it, I would have had ample time to have gone to the funeral. I thought from the telegram that he died on the 23d and was going to be buried on the 24th and that I have received the telegram too late to get there. I suffered a great deal of mental suffering or pain because I did not get to see the last of him—to see him for the last time—and to be present at his funeral. I worried a great deal. It caused me a great deal of worry and pain, because I could not be present at the funeral of my brother.

Cross-examination:

John Smith was my brother. I received the telegram be-
18 tween 11 and 12 o'clock. It stated that the funeral was on to-
morrow and I thought the funeral would be that day. I thought it useless for me to wire back. I did not request the funeral to be put off. A train leaves Weldon for Greenville about 3:30 in the afternoon, and it would put me in Greenville about 7 o'clock the same day. I did not wire that I had just gotten the telegram and ask them if they could not postpone the funeral. I heard from my brother the Thanksgiving before. We were together. He died in January, 1918. I did not have any letters from him since that time. I knew he was in bad health. I corresponded with another brother and kept in touch with this brother. I never had any letters from relatives until after I got the telegram. In ten days I got a letter from my living brother. I have no communication with any member of my dead brother's immediate family since his death. Only a clipping from a newspaper sent me. I did not write to any member of the family at all. I did not write to Appie O. Smith. I have never written her a letter. I have never gotten in communication with any member of his immediate family. After John Smith was dead I did not write a single letter to a single person of his imme-

diate family. I turned the telegram over to Mr. Green in two days. I went to Mr. Green. I called up my lawyer in two days after my brother died, but I did not write a letter to his family.

C. E. WILLIAMSON, being duly sworn, testified as follows:

I am telegraph operator for the Coast Line. Since December 25, 1909. The most direct route from Greenville, N. C., to Rosemary, N. C., for a telegraph message would be Greenville to Weldon and Weldon to Roanoke Rapids. I should say the route from Greenville to Weldon and Weldon to Roanoke Rapids would be the most convenient, direct and prompt route for the message to travel from these two points. In sending this message from Greenville to Richmond, then from Richmond to Norfolk and from Norfolk to Roanoke Rapids it was bound to pass through the Weldon office both times.

19 Cross-examination:

I worked for the Western Union Telegraph Co. at Battleboro for four years. At the time I was an operator for the Coast Line. In Weldon I worked at the block office. I would say the most direct route from Greenville to Roanoke Rapids would be by Weldon, but it might not be the quickest. There is no difference between quickest and promptest. (Paper is handed witness.) I said in that paper that the route by Weldon was the most direct route. but not the quickest. I mean, under the circumstances, that it is not the quickest, but the most direct. The circumstances are as the wires are arranged now. If Greenville wanted Weldon, she would get Richmond to tell Weldon to answer Greenville. They would have to call Richmond first and ask Richmond to call Weldon to tell Weldon to answer the Greenville call. This has been the custom ever since I commenced to work, I know. Nearly ten years. It is not practicable for Greenville to work with every office in North Carolina. It works with Richmond. That is the relay point. They send to Richmond, Richmond sends Weldon's business back to Weldon. Greenville sends to Richmond and Richmond sends to Weldon. This has been the custom ever since I have known anything about it. They would get to Roanoke Rapids by sending to Richmond, Richmond to Norfolk, Norfolk to Roanoke Rapids. It could be handled at Weldon. Weldon is a relay point for Kinston branch, for Oak City and Tillery, but not for Greenville. Wire No. 111 runs to Weldon from Greenville. All of them run through the Weldon office for test purposes If there should be trouble with the Weldon wire, it could cut in on another from a great many places in such a way as to systematically distribute them and avoid congestion. I did not mean that Weldon was the promptest route to get the message through to Roanoke Rapids under the present circumstances. These circumstances have been in existence ever since I have been operator and have known anything about it. The way by Richmond would be the quickest way; that is, with the wires
20 arranged as they are now, and they have been arranged that way ever since I have been an operator.

Redirect examination:

I say that Weldon is the relay office for Oak City and Tillery. The reason for the present method of transmitting messages via Richmond and Norfolk and back to Roanoke Rapids is because of the present arrangement of the wires. The Weldon office can cut in on wire No. 11 and any other wire that passes through Weldon. There is a wire from Weldon to Roanoke Rapids. Weldon can work direct with the Roanoke Rapids office. The wire runs from Norfolk to Roanoke Rapids and has to come through the same switchboard and you can cut in on the wire. Unless this is done, Weldon would not know that Weldon was being called. They could ask Norfolk to call and tell Weldon to cut in.

Recross-examination:

Norfolk is a relay point for Roanoke Rapids. This has been the custom ever since Roanoke Rapids was established as an independent office. This has been for two years.

Plaintiff rests.

The defendant moved to nonsuit the plaintiff. The defendant's motion overruled; exception by the defendant. This is defendant's second exception.

Exception No. 2.

The defendant offers in evidence telegram marked Exhibit "B," which is as follows:

7N DO 6

Greenville, N. C., 9:45 A. M., Jan. 23-18.

Mrs. Addie Speight, Rosemary, N. C.:

Father died this morning. Funeral tomorrow.

1010 A APPIE O SMITH.

21 The defendant offers in evidence Tariff Book of the defendant company, marked Exhibit "C," as follows:

EXHIBIT "C."

Rules.

Acceptance of Messages for Transmission.

Rule 1.—Messages to Be on Message Forms and Dated from the Place Where Filed with This Company.

(*a*) Each message for transmission shall be written upon the form provided by the company for that purpose, or shall be attached

to such form by the sender, or his agent, so as to leave the printed heading in full view above the message.

(*b*) Every message filed for transmission at an office or agency of this company shall show as its point of origin the name of the city or town where such office or agency is located, and shall show the date when it is filed with this company, with the exceptions shown in paragraphs (*c*), (*d*) and (*e*) of this rule.

(*c*) A message from a point listed in the Tariff Book of this company as a three-star or four-star point, telephoned by the sender to this company's office at the transfer point designated in the Tariff Book for transmission shall show as its point of origin the name of the city or town from which it is telephoned. Existing practices governing the acceptance of messages telephoned by the sender from a point where this company has an office or agency, at a time when such office or agency is closed, may be continued in force until otherwise ordered.

(*d*) A message originating at a point on a connecting telegraph lines of the company at the transfer point designated in the Tariff line of the company at the transfer point designated in the Tariff Book of this company shall show as its point of origin and as its date the name of the city or town where, and the date when, it was originally filed with the connecting company and need not show the name of the place where or the date when it is filed with this company.

22 (*e*) A message originating with another telegraph company at a three-star or four-star point in connection with which a transfer point preceded by the letter Z is shown in the Tariff Book of this company, and transferred to this company at the Z transfer point, shall show as its point of origin the name of the city or town where it was filed with the other company, preceded by the letter Z, and as its date the date when it was filed with the other company, and need not show the name of the place where or the date when it is filed with this company.

(*f*) No message received by this company for transmission shall bear a point of origin or date otherwise than in accordance with the foregoing.

Note: For instructions governing the forwarding of messages, see Rule 8.

Rule 2. Each Message to Be Examined Before Acceptance.

(*a*) Read each message carefully before acceptance and, when necessary, make indistinct words plain by marginal notation before transmission.

(*b*) Give any aid or explanation necessary to enable the sender to prepare his message.

(*c*) Make no change in any message, but refer misspelled or abbreviated words to the sender for correction. If sender declines to make correction, accept message as written.

(*d*) Record place from, time filed, day, month and year.

(*e*) Request and record the sender's address, unless it is well known.

(*f*) Do not accept a message containing profane, obscene or libelous language.

(*g*) If the sender should fail to sign his message, call his attention to the omission. If he does not then sign it, write in the place of the signature the words "not signed."

Rule 3. Addresses.

(*a*) Request full and complete address. The importance of a complete address cannot be overestimated.

(*b*) Do not accept a domestic message with a code address.
23 Such a message inadvertently accepted and transmitted will be reported and undelivered by the office of destination.

(*c*) "Try Hotel" is not a sufficient address. If proper address cannot be furnished, endorse message "Accepted subject to sender's risk of delivery," after having so informed the sender.

(*d*) The address of a message to a passenger on a train should show the name of the railroad, train number or name or time due, and the place where the message is to be delivered, and also the point for which the passenger is bound. If the train is run in sections, the section should be specified, if known.

Example:

John Jones, en route Chicago, N. Y. C. train three,
due Cleveland 10:35 P. M., Cleveland, O.

Such messages should be prepaid and destined to a regular scheduled stop.

Persons filing messages addressed to persons on trains at terminal points should be advised that there is no assurance of their delivery. (See Rule 45 (*e*).) All such messages should, if possible, be addressed to an intermediate point.

(*e*) Addresses of private messages to officers and enlisted men at army posts should, whenever possible, specify the branch of service, regiment and company of the addressee e. g., Private John Jones, Co. A, 7th Regt., Infantry, Fort Sam Houston, Texas).

(*f*) Record "Phone" or "Don't Phone" after name of addressee, if the sender requests a message delivered or not delivered by telephone, as the case may be.

Rule 4. How to Count and Charge for Messages.

Count and charge for the following words, figures, etc.:

(*a*) All words, figures and letters in the body.

(*b*) All signatures, when there are more than one, except the last.

(*c*) All words after the last or only signature.

(*d*) All eextra words in an address.

24 (*e*) The words "Deliver and report charges," "Delivery guaranteed," "Report Delivery," and "Report Back" in the check.

(*f*) The word "Collect" in the check of a collect message will be counted, but not charged for.

Dictionary words taken from one of the following languages, namely: English, German, French, Italian, Dutch, Portuguese, Spanish and Latin; initial letters surnames of persons names of countries, counties, cities, towns, villages, states or territories and provinces will be counted and charged for the same as if written in full. The names of forts, barracks, army posts and army stations listed in the Tariff Book as telegraph stations will be counted as one word.

Excursion (English dictionary)	1 word
Herzlichen Glueckwunsch (German dictionary)	2 words
Nous Arriverons dimanche (French dictionary)	3 words
Dolce far niente (Italian dictionary)	3 words
Mijne groete aan mevrouw (Dutch dictionary)	4 words
Tudo esta perdido (Portuguese dictionary)	3 words
Un cabello haze combra (Spanish dictionary)	4 words
Errare est humanum (Latin dictionary)	3 words
G. W. E. A. (initials)	4 words
Van Dorne (surname)	1 word
McGregor (surname)	1 word
O'Connor (surname)	1 word
DeWitt (surname)	1 word
W. H. Brown Jr.	4 words
United States (country)	1 word
Red Hill (county)	1 word
St. Louis (city)	1 word
Red Bud (town)	1 word
South Orange (village)	1 word
New York (or N. Y.) (state or city)	1 word
District of Columbia (or D. C.)	1 word
Nova Scotia (or N. S.) (Canadian province)	1 word
Fort Slocum (Fort listed in Tariff Book)	1 word
25 New York, New Haven & Hartford Railroad	5 words
Western Union	1 word

Daylette (or day letter) ..... 1 word
Nightletter (or night letter) ..... 1 word
Parcelpost (or parcel post) ..... 1 word
New Year (or new year) ..... 2 words

Abbreviations of weights and measures in common use will be counted, each separately as one word. In groups consisting of letters and figures each letter and figure will be counted as one word. To prevent liability to error, numbers and amounts should be written in words, but the message will be accepted as written if the customer refuses to make the change. The sender's attention should be called to any punctuation marks appearing in the body of the message and told that if he desires them transmitted they will be included in the count and charged for.

In ordinal numbers the affixes st, d, nd, rd and th will each be counted as one word.

Lbs. (abbreviation of weight) ..... 1 word
Cwt. (abbreviation of weight) ..... 1 word
Hhds. (abbreviation of weight) ..... 1 word
10000000 (figures) ..... 8 words
Ten milion (amount in dictionary words) ..... 2 words
4442 (figures) ..... 4 words
44.42 (figures and bar of division) ..... 5 words
74¾ (figures and bar of division) ..... 5 words
A1 (letters and figures) ..... 2 words
42B618 (letters and figures) ..... 6 words
A3GHF (letters and figures) ..... 5 words
1st (ordinal number and affix) ..... 2 words
10th (ordinal number and affix) ..... 3 words
No. 185 West 22nd St. ..... 9 words

Exceptions.

" " (quotation marks) ..... 1 word
( ) (parenthesis) ..... 1 word

26 All groups of letters, when such groups are not dictionary words of one of the eight languages above enumerated, or combinations of such dictionary words, will be counted at the rate of five letters or fraction of five letters to a word. When such groups are made up of combinations of dictionary words of one of the specified eight languages, each dictionary word so used will be counted as one word.

To facilitate the checking of messages by receiving operators, in cases where irregular code words are counted double, domestic messages containing such words will bear a double check, as, for instance, "21/17 paid," the first group of numerals representing the number of chargeable words and the last, the number as written by the sender, if sent collect, the check will be "22/18 collect."

Ababa	(artificial group of 5 letters)	1 word
Hhgga	(artificial group of 5 letters)	1 word
Egadol	(artificial group of 6 letters)	2 words
Ceghxo	(artificial group of 6 letters)	2 words
Dutimerodal	(artificial group of 11 letters)	3 words
Ghrccexqdrr	(artificial group of 11 letters)	3 words
Dothe	(improperly combined)	2 words
Itis	(improperly combined)	2 words
Allright (or alright)	(improperly combined)	2 words
Havyu (2 dictionary words purposely mutilated and improperly combined)		2 words
Navy-yard (dictionary)		1 word
Can not (cannot or can't)		1 word

Exceptions.

A. M.	1 word
P. M.	1 word
F. O. B. (fob)	1 word
C. O. D. (or cod)	1 word
C. I. F. or C. F. I. (or Cif, or cfi)	1 word
C. A. F. (or caf)	1 word
L. C. L. (or lcl)	1 word
27 O. K.	1 word
Per cent (or percent)	1 word
%	1 word

The following examples illustrate the application of Section (*b*): (Extra words underlined)—

When a signature consists of the name of a company or firm, preceded by the title of an official, the title and the name of the concern together constitute one signature and there are no extra words.

Examples.

	No. of extra words.
President Federal Rubber Co.	None
Treasurer Adams Express Co.	None
Cashier First National Bank	None
Agent Prudential Insurance Co.	None

In cases such as the following there are two separate and distinct signatures, and only the last one will be carried free:

	No. of extra words.
Denver office, National Cash Register Co.	2
N. & W. Depot, U. S. Tire Co.	4

Exceptions.

John and Emma	None
Mother and father	None
H. A. Brown and family	None

The following examples illustrate the application of Section (*e*) (extra words in italic type):

Signatures.

	No. of extra words.
John Brown, *President*	1
Geo. H. Wilson, *General Menager*	2
Thomas Green, *Agent*	1
Henry Jones, *Receiver*	1
28 Union Trust Co., *Trustee*	1
John Jones, *Pres. Am'n Shoe Mf'g Co.*	5
Am'n Shoe M'f'g Co., *John Jones, President*	3
Cronk M'f'g Co., *Dept. 14*	4
Star Oil Co., *Atlas Branch*	2
Smith & Co., *By John Smith*	3
Smith & Co., *By John Smith, Jr.*	4
D. W. Call, Otto H. Falk, *Receivers*	4

In the following and like cases the added words *is* a part of the name itself and hence not an extra word when occurring in connection with a free signature:

	No. of extra words.
Edgerton & Co., Ltd.	None
Brown & Co., Inc.	None
John Brown, Jr.	None
John Brown, Third	None

The following examples illustrate the application of Section (*d*) (extra words in italic type):

Addresses.

	No. of extra words.
Mr. and Mrs. James Brown	None
O. L. McCord, *Personal*	1
Jones & Co., Dept. 15	None
Mr. Harris, E. C. Brown & Co.	None
E. C. Brown & Co., Attention Mr. Harris	3
Jno. Smith, 1911 Broadway, or *James Brown, 61 Wall St., N. Y.*	7
C. H. Huntington, Haskell 6123, or Main 5238	6
Jno. Smith or James Brown, 80 Wall St., N. Y.	3

A message addresesd, for example, to "W. Brown, 197 Broadway, and B. Wells, 60 Exchange Place, N. Y.," or a message addressed, for example, to "W. Brown and B. Wells, 197 Broadway," will in each case be charged for as two messages. A message addressed to "J. B. Jackson and S. B. Smith, Senate Chamber, Washing-
29 ton, D. C.," will be charged for as two messages. The additional address will not be considered as extra words. The address "John Smith, Geo. Jones and Samuel White" (at one address for three) indicates that three messages are to be delivered and three should therefore be charged for.

Rule 5. Request to Report Delivery—Special Delivery—Repeated Messages.

(*a*) If the sender requests a report of delivery, the words "report delivery" will be placed in the check. (See Rules 4 (*e*).

(*b*) A message to be specially delivered beyond the free delivery limits of the terminal office, and for which the delivery charge is not given in the Tariff Book, will be accepted upon the payment or guarantee of an amount sufficient to cover the message tolls and the probable cost of delivery, and will carry in the check the words "Deliver and report charges when they are to be paid by the sender, or the words "Delivery guaranteed." (35, 37.)

Rule 6. Checks.

(*a*) Check a paid or collect full rate message in accordance with the following examples:

1. Check of a ten-word message to a "this line" office:

"10 paid 25," or
"11 collect."

2. Check of a ten-word message to an "other line" office:

"10 paid 25 and 30," or
"11 collect."

3. Check of a ten-word message to an "other line" office which has differing "other line" rates (for example, Avondale 25-O Birmingham, Sub. free), where the addressee is not a telephone subscriber:

"10 paid 50 Delivery 25," or
"13 collect 2 extra, delivery guaranteed."

4. Same example as in paragraph 3 above, except that addressee is a telephone subscriber:

30 "10 paid 50 sub. free," or
"11 collect."

5. Check of a ten-word message for special delivery from a "this line" office when the delivery charges are known:

"10 paid 25 delivery $1.00," or
"13 collect 2 extra, delivery guaranteed."

6. Check of a ten-word message where delivery charge is unknown:

"14 paid 33 4 extra, deliver and report charges," or
"13 collect 2 extra, delivery guaranteed."

7. Check of a ten-word message bearing a delivery charge of 50 cents from an "other line" office, the "this line" and "other line" rates each being 25 cents:

"10 paid 25 and 25 Delivery 50," or
"13 collect, 2 extra, delivery guaranteed."

8. Check of ten-word collect message on which originating "other line" tolls are to be collected from the addressee (if, for example, the other line tolls are 25c. and this line tolls from transfer point to destination are 50c.):

"11 collect 50 and 25."

When the other line tolls on a collect message originating at a three-star or four-star point are paid by the sender, check the message:

"11 collect."

(*b*) Check a day letter, night message or night letter in same manner as shown above, and in addition insert after the word "paid" or "collect" the designation "blue" for a day letter, "Nite" for a night message, or "N. L." for a night letter.

For instructions governing transmission of checks, see Rule 22.
For checks on CAK or DH messages, see Rules 11 and 12.

Rule 7. Messages Offered During Interruption of Lines.

If a message is offered when communication is known to be interrupted, inform the sender it can only be accepted subject to delay, for transmission as soon as the lines are restored. Write upon such a message the words "Subject to delay."

31

Rule 8. Forwarding of Messages.

(*a*) In case a person, having received a message over the lines of the company, requests the same to be forwarded to another place, or if a person leaves town before the arrival of an unexpected message and it be received over the lines of the company and forwarded to him, in each case the message as forwarded will show, in addition to the name of the place from which it is forwarded and the date, the name of the place and the state from which it was originally sent and word "via," and the name of the place and state from which it was originally sent and the word "via" will be counted and charged for.

For example, if the following message were originally sent over lines of this company from New York to Troy, N. Y., and forwarded from Troy to Buffalo, it would be checked and dated thus:

"13 paid 2 extra,
New York, N. Y.,
Via Troy, N. Y., Oct. 24.

John Brown,
Buffalo, N. Y.:

Meet me next Monday at ten o'clock in the forenoon.

H. SMITH."

In this message the words "New York, N. Y., 23" and "via," five words, will be forwarded as a part of the message, and charged for.

(*b*) If the message to be forwarded is a back-date message, the original date will be shown in figures, counted and charged for. For example (assuming the same message as above, but as a back-date message):

"15 paid 5 extra,
New York, N. Y., 23,
Via Troy, N. Y., Oct. 24.

John Brown,
Buffalo, N. Y.:

Meet me next Monday at ten o'clock in the forenoon.

H. SMITH."

32 In this message the words "New York, N. Y., 23" and "via," five words will be forwarded as a part of the message and charged for.

(*c*) If the message is received as a paid message and is to be forwarded collect, the forwarding office will show in the check of the forwarded message the tolls to be collected to cover its transmission from the forwarding point to the place to which it is forwarded, and will date the message as shown in subdivision- (*a*) and (*b*) of this rule. For example: A 10 paid message from New York, N. Y., to Troy, N. Y., forwarded collect from Troy, N. Y., to Buffalo, N. Y. (the rate from Troy, N. Y., to Buffalo, N. Y., being 35-2), will be checked and dated as follows:

"14 collect 3 extra, 41,
New York, N. Y.,
Via Troy, N. Y., Oct. 24.

If the message is a back-date message, the original date will be shown and the number of extra words increased as shown in (*b*) above.

The amount to be collected at destination to cover the forwarding charges will be transmitted as a part of the check (see Rule 22).

(*d*) When a message, which has been received over the lines of this company and which is to be forwarded, is a "received collect" message, the forwarding office will check is so that the tariff from the originating office to the forwarding office shall appear separately and as a double check.

Illustration: Suppose the tariff from New York to Troy to be 25 and 2, and from Troy to Buffalo 35 and 2, and ten-word message has been sent "collect" by New York to Troy, which the latter office is to forward to Buffalo; Troy should check the message (counting three extra words): "14 collect 3 extra, 41 and 25." The "41" represents the tolls for 13 words from Troy to Buffalo and "25" represents the tolls for ten words from New York to Troy. If the message be
33 a back-date message, Troy should check the message "15 collect 4 extra, 13, and 25," according to whether the figures indicating the back-date consist of one or two numerals.

The figures representing the amount of tolls to be collected will be transmitted as a part of the check (see Rule 22).

(*e*) In a message forwarded more than once only the original place and the last forwarding place will be shown in the date.

(*f*) All service messages relating to forwarding messages carrying a via should be addressed to the via point and not to the originating point.

Rule 9. No Promise as to Transmission or Delivery.

Do not make any promise respecting the transmission or delivery of a message.

Rule 10. Collect Messages—Guarantee Deposits.

(*a*) Accept collect without the deposit of a guarantee, and answer to a prepaid message; a message signed by a member of a social or commercial organization of recognized standing identifying himself as such by presentation.

Rule 23. Number, Time and Personal Signal.

(*a*) Write upon the face of each message sent the consecutive number to and the call of the distant office, also the time sent and signals and the sending and receiving operators.

(*b*) Do not regard the message as sent until acknowledged by the distant operator, unless several messages have been sent in succession, when the acknowledgment of the last will be regarded as the acknowledgment of all.

Rule 24. Messages Delayed in Transmission.

Note the cause of delay on the back of the message or number sheet, when for any reason a message cannot be transmitted promptly. Also report the facts to the manager or chief operator.

Rule 25. All Messages to be Transmitted Before Closing.

Transmit all messages to their destination or to the nearest relay office before closing. If for an unavoidable reason any
34 are held over until the following morning, transmit them before new business.

Rule 26. Order of Receiving.

(*a*) Copy each message as transmitted. Enter on the blank after the number of the message the call of the sending office and the receiving operator's signal.

(*b*) Verify the check by counting the number of words. Make sure the message has been correctly received.

(*c*) Write the time received in the lower right-hand corner and acknowledge receipt by giving the sending office an "O. K." followed by personal signal.

Rule 27. Messages to More than One Address.

When a message is addressed, for example, to "A or B" for delivery to either, transmit it as a single message. When a message is addressed to "A or B," or to several persons, for delivery to each of them, transmit the check, place from, date, text and signature at one sending and fill in the addresses afterward, so as to use the wire facilities to the best advantage.

Rule 28. Duplicate Transmission.

(*a*) If a second transmission is necessary in order to correct any error in a message, or for any other reason, begin the second transmission with the word "Duplicate." The receiving operator will write or stamp the word "Duplicate" conspicuously on the form above the message, also following the check.

(*b*) If the service message requesting a duplicate is signed by a branch officer or by an individual employee, insert as a part of the address of the duplicate, before the destination, the word "care," followed by the name of the branch office or employee signed to the service message.

(c) Do not send a service message with a duplicate unless for some special reason.

Rule 29. Transmission of Repeated Messages.

(a) Observe special care in sending or receiving a message requiring repetition, and bearing in the check the indication, "Repeat back."

35 (b) Repeat back such messages at each state of transmission from the point of origin to destination.

(c) Make careful comparison with the original as the message is repeated back, underlining or checking each word, and, if found to be correct, write across the face of the message the words, "Repeated back O. K." followed by the signals of both operators.

Rule 30. Examination of Sent Messages for Evidence of Transmission. Comparison of Numbers.

(a) Before closing the office for the night, carefully examine all "sent" messages to see that they bear the proper indication of transmission.

(b) Also examine the numbers on messages sent and received to see that none are missing. Compare numbers with other offices with which messages have been exchanged during the day, correcting any errors discovered.

Rule 31. Wire Tests, Cutting Out Instruments at Night, etc.

(a) Make early morning tests of the wires. Call attention to any that may be out of order and keep a daily record of all such interruptions.

(b) Assist distant wire chiefs and linemen as much as possible in locating and clearing trouble.

(c) Use the ground wire at an intermediate office in the event of an interruption of the circuit, but then only long enough to notify the distant wire chief and receive his instructions.

(d) Before closing the office temporarily or for the night, cut out the instruments, being careful that the circuit through the switch or cut-off is complete.

(e) Keep the batteries in good condition, and see that each cell is thoroughly insulated so as to prevent any escape of current. Also keep the floors, shelves and fixtures of the battery room scrupulously clean. For detailed instructions concerning care of batteries, see Rule 68.

36 Delivery of Messages.

Rule 32. Preparation for Delivery.

To permit ready reference, number each message consecutively for delivery in the order received, commencing with No. 1 each day.

(*b*) Copy each message for delivery and enclose it in the proper envelope, which should be carefully sealed and fully and plainly addressed.

(*c*) Where charges are to be collected, write the amount in ink on the envelope and also on the messenger's delivery sheet.

(*d*) Collect the tolls for both "this line" and "other lines" upon a message received "collect" from an "other line," "three-star" or "four-star" station, whenever the check shows both "this line" and "other line" tolls (for example, on a message checked "11 collect 50 and 25" collect 75 cents). Where no amount of tolls is shown in the check (for example, checked "11 collect"), collect the "this line" tolls only.

(*e*) Observe instructions from the sending office in regard to delivery. When a message is received with the notation "Report Delivery" in the check, indicating that the sender has requested a report of delivery (See Rule 5*a*), the request should be responded to by a collect message addressed to the sender of the original, stating the time of delivery, or if not delivered, the reason why.

Rule 33. Special Cases.

(*a*) Lay aside until disposed of the copy of a message requiring an answer or one relating to illness, death or containing extra words in the check such as "Report Delivery," "Personal," "Repeat back," etc. Make sure.

Interstate Commerce Commission,

Office of the Secretary,

George B. McGinty, Sec., Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of
37 pages 246, 247, 248 and 253 of the Western Union Telegraph Co. Tariff Book, 1917, received on March 12, 1917, from the Western Union Telegraph Co., and now on file with the Interstate Commerce Commission.

In witness whereof I have hereunto set my hand and the seal of said commission this, the 16th day of February, A. D. 1918.

GEORGE B. McGINTY,

[SEAL.] *Sec. of the Interstate Commerce Commission.*

The defendant offered in evidence the blank form of telegram, showing on the back of same rules, marked Exhibit "D," as follows:

Western Union

Telegram.

Newcomb Carlton, President.
George W. E. Atkins, Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

(Back of Form.)

All telegrams taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half of the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

1. The company shall not be liable for mistakes, or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for non-delivery of any Repeated Message, beyond fifty times the sum received for sending the same, unless specially valued; nor in case for delays arising from unavoidable interruption in the working of its lines; nor for error in cipher or obscure telegrams.

38 2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

3. The company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.

8. No employee of the company is authorized to vary the foregoing.

Classes of Service.

Fast Day Messages:

A full-rate expedited service.

39 Night Messages:

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

Day Letters:

A deferred service at rates lower than the standard day message rate for the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

Special Terms Apply to Day Letters:

In further consideration of the reduced rate for this special "day letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such day letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day letters shall be written in plain English. Code language is not permissible.

C. This day letter may be delivered by the Telegraph Company by phoning the same to the addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This day letter is received subject to the express understanding and agreement that the company does not undertake that a day letter shall be delivered on the day of its date absolutely and at all

events; but that the company's obligation in this respect is subject to the conditions that there shall remain sufficient time for the transmission and delivery of such day letter on the day of its date during the regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above

No employee of the company is authorized to vary the foregoing.

Night Letters.

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

Special Terms Apply to Night Letters.

In further consideration of the reduced rate of this special "night letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night letters may at the option of the Telegraph Company be mailed at destination to the addressee, and the company shall be deemed to have discharged its obligations in such cases with respect to delivery by mailing such night letters at destination, postage prepaid.

B. Night letters shall be written in plain English. Code language is not permissible.

No employee of the company is authorized to vary the foregoing.

Interstate Commerce Commission.

Office of the Secretary.

Washington.

George B. McGinty, Secretary.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of a form received on February 20, 1917, from the Western Union Telegraph Company and now on file with the Interstate Commerce Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this, the 25th day of February, A. D. 1918.

[SEAL.] GEORGE B. McGINTY,

Sec. of the Interstate Commerce Commission.

The original telegram marked Exhibit "A" is on a form similar to the blank form marked Exhibit "D," with the same terms and rules on the back thereof.

41 The defendant offers in evidence the statement of the witness, C. E. Williamson, marked Exhibit "E," as follows:

EXHIBIT E.

"Weldon, N. C., Sept. 15-18.

Mr. A. A. McKay, Chief Dispatcher, Richmond, Va.

DEAR SIR:

Referring to attached, Weldon is the most direct route, but not the quickest under the present arrangements.

Yours truly,

C. E. WILLIAMSON,
Operator."

This paper was identified by witness as his statement.
The defendant offers in evidence the depositions of—

E. M. KILPATRICK testified as follows:

My name is E. M. Kilpatrick; age 35; residence Norfolk, Va.; occupation Chief Operator Western Union Telegraph Company. I have been connected with the Western Union Telegraph Co. 15 years. I have been in the telegraph business 17 years. Chief operator 4½ years. I am acquainted with the route adopted by the telegraph Co. for handling messages between Greenville, N. C., and Roanoke Rapids, N. C. There are two direct routes from Greenville through Richmond to Norfolk to Roanoke Rapids, or from Greenville to Norfolk to Roanoke Rapids. It has to come through Norfolk in either case. It can be sent from Greenville to Richmond or Greenville to Norfolk. It is not possible under the system adopted by the Western Union Telegraph Co. for a message between those points to go other than through Norfolk. The purpose of a relay office is to systematically distribute the business that has to be transferred from one line to another, and there has to be a
42 regularly equipped office for that purpose. We have regular appointed relay offices. Norfolk is the regularly appointed relay office for Roanoke Rapids. The wire from Norfolk to Roanoke Rapids goes through the Weldon office, but for test purposes only. It is not operated at Weldon. That is a regular local for the Weldon office and also for the Greenville office. Weldon receives its messages from Richmond over the same circuit. Weldon is not a relay office. There is only one operator there. The usual and customary route is from Greenville to Richmond to Norfolk and thence to Roanoke Rapids. It could have come to Norfolk direct from Greenville, but Richmond handles practically all of Greenville's business and is its principal outlet. Richmond does not work with Roanoke Rapids. This system of relay points mentioned has been in effect as long as I have been in the business—for at least 17 years. I

made an investigation of the message involved in this case. The message was received from Richmond in the Norfolk office at 9:58 a. m., Jan. 24th, and was transmitted from Richmond office to Norfolk and sent to Roanoke Rapids from Norfolk at 10:12 a. m. the same date. It is impossible for every office to work direct with other office.

J. L. BUNDY testified as follows:

I am a Western Union telegraph operator at Richmond. Been in the employment of the Western Union about 7 years. I was in Richmond when the message referred to in this action was received. The message was received by me from Greenville at 9:51 a. m. and was transmitted to Norfolk, another relay point. Richmond is the distributing point for Greenville. Greenville is located on wire running from Norfolk to Kinston and also on wire passing Weldon to Richmond. Greenville can work with either. Roanoke Rapids has to work with Norfolk. Greenville to get the message through in the promptest way would send to Richmond, Rich- to Norfolk and Norfolk to Roanoke Rapids. Greenville can work with
43 Norfolk on the Norfolk-Kinston wire, but this would not be the quickest and most convenient route. The quickest way to get a message through is by way of Richmond to Norfolk, Norfolk to Roanoke Rapids. Norfolk is the outlet for messages sent to Roanoke Rapids. Richmond is in the State of Va. and Greenville is in the State of N. C. The operator at Weldon could only tell when Greenvile is calling Richmond by cutting in on the wire, which he would hardly do. Unless this was done Weldon would not know that Greenville was calling Richmond or that it was trying to call Weldon. The wires come in Weldon instead of being run on poles are brought into the Weldon office in a loop, and this loop runs through the switchboard. This is done for test purposes, and in case of storms or trouble you can tell where the trouble has occurred by testing. Sometimes the wires are broken and you can patch a bad wire on a good one. The operator at Weldon has a plug that he can take and plug and cut in on any wire he wishes to, but ordinarily he would not do this unless he was called and told to cut in and listen. There are a good many of these wires strapped to the switchboard in Weldon as I said for test purposes and have no instrument attached to them, and the only way that you can hear what is passing on them would be for the operator to cut in with this plug. The wire from Greenville to Richmond is the regular local wire for Greenville and Weldon. Weldon received its messages over the same circuit. Richmond has been the relay point for points in this section ever since I have been there. It is impossible to send direct from Greenville to Roanoke Rapids. Greenville has no Roanoke Rapids wire. Greenville would send to Richmond and Norfolk to get to Roanoke Rapids. Greenville could, of course, send the message by way of Norfolk without going through the Richmond office, but it would have to use wires that carry a large volume of business and it would

take longer to get the message through that way than it would by the way of Richmond. The Western Union estimates the load its wires will carry and it has arranged its wires into Richmond in such a way as to carry the load without congestion. Rich-
44 mond is equipped for doing this relay work in the quickest possible way. It can be done more promptly than by way of Norfolk to Roanoke Rapids. I should say that from Greenville to Richmond to Norfolk to Roanoke Rapids is the promptest, most convenient and necessary route. The company has created these relay points at intervals to facilitate the sending and distributing of messages and to dodge congestion. The outlets for Greenville are as I have said Norfolk and Richmond, and in order to get messages through in the quickest possible manner, it is necessary to send to Richmond to be handled there. There they are transmitted to Norfolk quicker than they could be sent on by local wire. It is not possible on the local wires to work direct with every other point in North Carolina, because they haven't got the circuits going through the switchboards. You can only work the circuits going through the switchboards. If Weldon was made a relay point for all these different points in N. C., it would take 4 operators. There are about 12 wires coming through the Weldon office, so that would be 12 circuits. An operator can work 3 wires. Weldon would then be working 4 wires into Richmond instead of one, outside of what would come in from Norfolk. It would mean a great deal more work. In some of these small places an operator works for the R. R. Co. and for the Western Union. The local wire would have to handle the business for both. Relay points are done to expedite business. It is necessary to have these concentration or relay points to handle the volume of business from a great many small offices, so that it can be distributed systematically. Relay points are gotten up by the company for the quick delivery of messages. Greenville is a one operator office, it has two outlets, one at Richmond and one at Norfolk. Roanoke Rapids has only one outlet, Norfolk.

Cross-examination:

I could not testify that this was a message delivered to the Company at Greenville. It has the appearance of being one.
45 The mistake occurred after it left Greenville. The wire on which this message went from Greenville to Richmond passed through the Weldon office. The wires are arranged so that they can be cut in. The wires are arranged by the company so as to best take care of the volume of business; every wire has to carry its load. By load I mean the number of messages it can handle with dispatch. About 15,000 messages come through the Richmond office in the course of 24 hours. It depends a great deal upon the character of the message as to its delivery. Messages of the character mentioned are often given the preference over others. If urgent it might be rushed through sooner than some others.

Redirect:

The reason that this large number of messages pass through the Richmond office and the Norfolk office is that they are relay points. They have something like 240 wires. If these messages were not relayed it would create congestion at other places. These relay points are for the purpose of dodging congestion—to take advantage of congestion. Without these relay points there would be confusion and congestion and these relay points were created to take care of this.

Mr. CHAS. HOTZE testified:

I am the operator that handled that message. I sent it just as it is.

Mr. H. T. BROCK testified:

I was an operator at Roanoke Rapids in January of this year. I received the message from Norfolk, the relay point for Roanoke Rapids. I worked with Norfolk. I got the message from Norfolk, because that was the regular relay point laid out by the company at which to handle their business. This has been done ever since the office was established at Roanoke Rapids in Nov. 1915, I think.

46 Cross-examination:

I don't exactly remember what Mrs. Speight said. It has been some time ago. I remember a part of it ali right. As well as I remember she said it was Thanksgiving—the past Thanksgiving a year ago that she saw her brother. The message came to me changed to the 23d. I do not know exactly where the change occurred. It was sent to me from Norfolk dated the 23d. I received it from Norfolk as the 23d.

It is admitted that the message was not repeated by the sendee. It is classified as an unrepeated message.

The defendant rests.

At the close of all the testimony the defendant again moved that plaintiff be nonsuited. Motion overruled; defendant excepts, and this is defendant's third exception.

Exception No. 3.

His Honor charged the jury as follows:

Judge's Charge.

Gentlemen of the jury, the plaintiff's name is Mrs. Addie Speight. This is an action brought by Mrs. Addie Speight against the Western

Union Telegraph Company to recover damages for and on account of mental anguish, which she alleges she suffered on account of the Western Union Telegraph Company's negligence and carelessness in failing to transmit a message which was sent her by her niece from Greenville, N. C. to Rosemary, N. C.

The plaintiff contends, gentlemen of the jury, that some time on the 24th day of January that her alleged niece sent her a message from Greenville in this State to her place of residence in Rosemary in this county and in the State, and she contends that the Telegraph Company negligently changed the date of the message; that it was sent on the 24th, but that it was made to read the 23d when it was received by her, and she contends that when
47 she received the message that it was dated the very date that her said niece said her brother was to be buried. She contends, gentlemen of the jury, that if the message had been sent and had been received dated the 24th as it was sent, that she could have gotten there in time to have attended his funeral on the 25th. She contends, gentlemen of the jury, that if the date had not been changed she would have been able to have taken a train at Weldon and to have gotten to Greenville in time to have seen her brother buried. She contends that by reason of this negligent sending of this message that she was unable to go to her brother's funeral; that she suffered great physical and mental pain; that she grieved on account of it a great deal, and she contends, gentlemen of the jury, that you ought to compensate her for this pain and mental suffering.

She contends, gentlemen of the jury, that this message ought to have gone direct from Greenville to Rosemary; that it could have been sent first to Weldon and then relayed at Weldon and sent to Rosemary. She contends, gentlemen of the jury, that this message was transmitted through the State of Virginia in order to fraudulently evade any liability which the Company might incur on account of any negligence which might occur in the transmission of messages, and she contends that you ought to find that this message ought to have gone direct from Greenville to Rosemary by way of Weldon, and she contends that you ought to find that the date of the said message was changed in such a manner that it made it appear to arrive in her hands on the very day of her brother's funeral, and she contends that she suffered great mental anguish on account of this negligence on the part of the defendant company, and she contends, gentlemen of the jury, that you ought to find that she has been damaged in a large amount, in the sum of $3,000 or some other large amount. She contends, gentlemen of the jury, that you ought to award her compensation for her sufferings and that she ought to recover damages for the great physical suffering and mental
48 anguish which she underwent by reason of the negligence and carelessness of the defendant company.

Now, gentlemen of the jury, on the other hand, the Western Union Telegraph Company contends entirely different about this matter. The company contends that it received this message and transmitted

it the usual customary way, the proper way to send the message to the sendee, to Mrs. Speight, the plaintiff in this action. The company contends, gentlemen of the jury, that it first sent the message through Weldon to Richmond because that was the relay office of this section for these messages; that all messages going out of Greenville were either sent to Richmond, Va., or to Norfolk, Va., and relayed and distributed to other points. The defendant contends that this message went by Richmond and that it was sent then to Norfolk, Va., because Norfolk, Va., was the point from which the message was relayed to Roanoke Rapids or Rosemary. The defendant contends that it sent the message the usual customary way and the way that messages of that character had been sent for long years—a number of years—and the defendant contends, gentlemen of the jury, that it is not liable, because under the Act of Congress, the Federal Laws of the United States, they are not liable for any mental anguish which might occur to the sender of a message or to the sendee of a message, by reason of the negligent delivering of messages or failure to deliver as they should have delivered it. The defendant contends, gentlemen of the jury, you ought to find that they transmitted this message through the State of Virginia for the purpose of evading liability under the laws of the State of North Carolina, but they simply sent the message from Greenville to Richmond, because that was the usual way to do it, the most convenient route, the promptest and best way in which to send it, and the way in which they had been sending messages to and from these points, from which points to be sent to various other points, for a great length of time.

Now, they contend, that is the Western Union Telegraph Co., that if you should find that the defendant negligently
49 transmitted the message and that in the transmission they changed the date in such a way that the sendee, the plaintiff who received the message, could not get to her brother's funeral; they contend that even if you should find that, that you still ought not to find that they are liable for any amount of damages; that the relation between her and her brother was not so close; that the relation was not so devoted that she would suffer great pain or that she suffered great mental anguish by reason of not being able to attend the funeral of her brother. The Telegraph Company contends, gentlemen of the jury, that she has not seen her brother for more than a year and that she did not communicate with him; that she only got information from him and his family by corresponding with another brother, and the company contends gentlemen of the jury, that even if you should answer the first issue "Yes" against the Company, that you ought not to assume that she is entitled to recover any damages, and that you ought to find from the evidence that she did not suffer very much, and that she is not entitled to recover any damages whatsoever.

Now, gentlemen of the jury, three issues are submitted to me. The first is: "Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?" The Court charges you, gentlemen of the jury, that the burden is upon the plain-

tiff as to this issue to satisfy you by the evidence and by its greater weight that the message was sent out of this State for the purpose of fraudulently evading liability under the laws of the State of North Carolina in the event that any negligence occurred in the transmission or receiving of the message. I mean by greater weight this, gentlemen of the jury, that the side upon whom the burden is put must outweigh the other side ever so little, that is, the greater weight of the evidence upon one side must outweigh the evidence
50 submitted by the other side. It may do this ever so little, but it must outweigh it some, the side upon whom the burden is put. So, if you are satisfied by the evidence and the greater weight of the evidence, how much weight you must give the evidence—and you must take into consideration all of the circumstances surrounding the evidence; you can take into consideration the manner and character of the witnesses who testified about this matter.

The defendants excepts to so much of his Honor's charge as hereafter follows in parentheses:

(If you are satisfied from the evidence and by its greater weight, as I have defined greater weight to you, that the defendant Co. sent this message out of the State of North Carolina through the State of Virginia for the purpose of fraudulently evading liability under the laws of the State of North Carolina, you will answer the first issue "Yes," and this is defendant's fourth exception.)

Exception No. 4.

But if you are not so satisfied, then the Court charges you to answer this issue "No." If you answer this first issue "No," you need not answer the other two issues. But if you answer it "Yes," you can come to the second issue—to the other two. The Court charges you that naturally the Company handles a great many of these messages, and that on account of what appears upon its face it was required to use greater care in sending and receiving it than they would for ordinary messages or than they would under ordinary circumstances.

Now, you come to consider the second issue, which is: "Was the message negligently changed in transmission by the defendant?" The burden is also put upon the plaintiff here, that is, upon Mrs. Speight, to satisfy you by the evidence and its greater weight that this message was negligently changed; that is to say, that the date of it was changed. If you so find, gentlemen of the jury, that it was negligently changed in the transmission, then you must
51 answer the second issue "Yes"; if you do not so find from evidence, then answer the second issue "No."

Having answered these two issues, gentlemen of the jury, you would come to consider the third issue. The burden is upon the plaintiff to show that this message was negligently changed by the defendant, and further upon the plaintiff to show you by evidence and by its greater weight, that on account of the negligent changing of the date of the message the plaintiff was endamaged; that she suffered mental anguish and was greatly damaged thereby, and the plaintiff must satisfy you as to this by the evidence and by the greater weight of the evidence as I have defined greater weight to you.

Now, gentlemen of the jury, when you come to consider this last issue: "What damage, if any, is the plaintiff entitled to recover?" This negligence on the part of the defendant must not only have caused this suffering complained of by the plaintiff in this action, but it must have been the proximate cause of it. Negligence is the failure to do what a man of ordinary prudence would have done under the existing circumstances; or of not doing what an ordinarily careful man would not have done under the circumstances. Now, gentlemen of the jury, if you should find that this message or the date of this message was negligently changed in transmission by the defendant, and you answer the second issue "Yes," then you must go further and find if the plaintiff suffered by reason of this negligence, and if so, how much she was damaged, and if you should find that she has been endamaged, what compensation, if any, she is entitled to recover. Did she suffer mental anguish? Did she suffer great physical pain and mental anguish in not being able to attend the funeral of her dead brother? Was this mental anguish because of not being able to go to the burial of her brother? If her failure to attend the funeral occasioned regret or caused her some worry that would not be mental anguish. I will try to define mental anguish for you. Mental anguish is suffering in a high degree, in an
52 extreme degree, not merely just being disappointed, and if she did not suffer in a high degree, if her suffering was not of a severe nature, and it must be a mental pain of high degree—she would not be entitled to recover. But if you find that the plaintiff did suffer in such a great degree, that she suffered great physical and mental pain and anguish by reason of not being able to see her brother and in not being able to attend her brother's funeral, then you would go further and say how much you find from the evidence she is entitled to recover, not what you feel about the matter. You will be governed by the evidence in the case and give a fair and reasonable compensation for what mental suffering she experienced, if you find by the greater weight of evidence that by reason of the negligence of the defendant in failing to deliver the message as it was sent she suffered great physical and mental pain.

Now, gentlemen of the jury, I charge you that the law says that you ought to scrutinize very carefully the evidence of an interested witness; you must scrutinize the appearance of the witness, the manner in which he or she testifies, their conduct when on the witness stand, but the rule goes further and says that if you do this and if you believe that the interested witness has told the truth, then you are to give just as much weight to their testimony as you would to that of a disinterested witness.

You are, gentlemen of the jury, the judges of what the evidence is in this case, you are not, gentlemen of the jury, compelled to take what the counsel for the plaintiff may recall was the evidence, you are not compelled to consider what counsel for the defendant may state as his recollection of the evidence in the case; and if the Court should undertake to tell you what his recollection is you are not bound to consider that; it is for you to say how much weight you will give to the evidence. Now, gentlemen of the jury, the Court has no

opinion about this case, as to whether certain facts have been proved or not. The Court charges you that the fact that one of these
53 parties is an individual and the other a corporation should not prejudice you. When people come into court they should stand upon the same plane. This case is important to the plaintiff and it is important to the defendant. You, gentlemen of the jury, are to take the evidence and weigh it; you are the sole judges of what the evidence was, and you must be the judges of the consideration you will give it.

Now, gentlemen of the jury, take the case and see how you will answer these issues.

Requests for Special Instructions.

The defendant in apt time requested the Court to give the following special instructions:

1. That upon the whole evidence the plaintiff is not entitled to recover and the jury should answer the first issue "No," and the third issue "Nothing."

Exception No. 5.

2. That this being an unrepeated message, in no event is the plaintiff entitled to recover only the charges for sending same, that is, the sum of 40 cents.

The Court refused to give this special instruction. Defendant excepted, and this is the defendant's sixth exception.

Exception No. 6.

The jury answered the first issue "Yes," the second issue "Yes," and the third issue "$100."

Upon the coming in of the verdict, the defendant made a motion that in no view of the testimony as a matter of law was the plaintiff entitled to recover, and his Honor allowed the motion, set aside the verdict, and signed the judgment tendered by the defendant.

In order to preserve the exceptions entered by the defendant in the action, the defendant appeals to the Supreme Court and on the 16th day of December, 1918, caused its appeal to be entered
54 by the clerk on the judgment docket and gave notice thereof to the plaintiff on the same day, the notice being as follows:

Notice of Appeal.

STATE OF NORTH CAROLINA,
Halifax County:

In the Superior Court, December 16, 1918.

(Title of Cause.)

To Mrs. Addie Speight, plaintiff:

This is to notify you that the Western Union Telegraph Company, the defendant in the above entitled action, appeals to the Supreme Court of North Carolina from the judgment rendered in said action in the Superior Court of Halifax County, at the November Term of said Court, which adjourned on the 7th day of December, 1918. This appeal is by reason of the admission of incompetent testimony and the rejection of competent testimony and for error to be assigned in the charge of this Court.

This the 16th day of December, 1918.

W. E. DANIEL,
Attorney for Western Union Telegraph Co., Defendant.

And service thereof was accepted on said day by Geo. C. Green, attorney for the plaintiff.

Defendant's Grouping of Exceptions and Assignments of Error.

The defendant, the Western Union Telegraph Co., groups its exceptions and assigns error as follows:

1. For that the Court submitted the first issue: "Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?"

This is defendant's Exception No. 1.

2. For that the Court during the trial at the close of the plaintiff's testimony and at the close of all the testimony overruled the motion of the defendant to nonsuit the plaintiff.
55 These are the defendant's Exceptions Nos. 2 and 3.

3. For that the Court in his charge charged the jury as follows (over the objection of the defendant):

"If you are satisfied from the evidence and by its greater weight, as I have defined greater weight to you, that the defendant company sent this message out of the State of North Carolina through the State of Virginia for the purpose of fraudulently evading liability under the laws of the State of North Carolina, you will answer the first issue 'Yes.'"

This is the defendant's Fourth Exception.

4. For that the Court refused to give the jury the following special instructions requested by the defendant:

"That upon the whole evidence the plaintiff is not entitled to recover and the jury should answer the first issue 'No,' and the third issue 'Nothing.'"

This is defendant's Fifth Exception.

5. For that the Court refused to give the jury the following special instruction requested by the defendant:

"That this being an unrepeated message, in no event is the plaintiff entitled to recover only the charge for sending the same, that is, the sum of 40 cents."

This is defendant's Sixth Exception.

W. E. DANIEL,
Attorney for the Defendant, The Western Union Telegraph Co.

This is agreed case on appeal.

GEO. C. GREEN,
For Plaintiff.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
Halifax County:

In the Superior Court.

I, Sterling M. Gary, Clerk of the Superior Court for the county of Halifax, State of North Carolina, do hereby certify, that the foregoing is a full, true and perfect transcript of the record in the
56 case where Addie Speight is plaintiff, and Western Union Telegraph Co., defendant, lately pending in said Court.

Witness my hand and official seal at office in Halifax Town, this the 31st day of July, A. D. 1919.

[SEAL.]

STERLING M. GARY,
Clerk Superior Court.

1 In the Supreme Court of North Carolina, Fall Term, 1919.

ADDIE SPEIGHT

against

WESTERN UNION TELEGRAPH COMPANY.

Copied from Minutes.

Transcripts of appeal by the plaintiff and by the defendant from the Superior Court of Halifax County, docketed in Supreme Court of North Carolina, August 6, 1919. Case argued September 9, 1919. Opinion by Walter Clark, Chief Justice, dismissing appeal of de-

fendant and declaring that judgment should be entered in favor of plaintiff, delivered October 8, 1919. Justice Walker concurred in result, filing no opinion; Justice Allen dissented, but filed no dissenting opinion; Petition of defendant to rehear addressed to Justices Walker and Brown, filed November 10, 1919. Petition to rehear denied November 18, 1919.

Justice Brown was not present and did not participate in the hearing of the case nor in the rendering of the opinion of the Court, but Justice Brown was sitting with the Court at the time the petition to rehear was filed.

2 In the Supreme Court of North Carolina, Fall Term, 1919, Halifax County.

No. 100.

ADDIE SPEIGHT

against

WESTERN UNION TELEGRAPH COMPANY.

Plaintiff's Appeal.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Halifax County—upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court to the intent that the judgment be reversed.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of sixty-three 95-100 ($63.95), and execution issue therefor.

3 In the Supreme Court of North Carolina, Fall Term, 1919, Halifax Co.

No. 101.

ADDIE SPEIGHT

against

WESTERN UNION TELEGRAPH COMPANY.

Defendant's Appeal.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Halifax County—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the appeal be dismissed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to wit, the sum of thirteen 55-100 dollars ($13.55), and execution issue therefor.

North Carolina Supreme Court, Fall Term, 1919, Nos. 100 and 101, Halifax.

(Title of Cause.)

Appeal by Defendant from Kerr, J., Nov. Term, 1918 of Halifax.

4 This was an action for damages for the negligent alteration in the transmission of a telegram from Greenville, N. C. to Rosemary, N. C., both in this State. The message was as follows:

"Greenville, N. C., 9:45 a. m., 1-24-18.

Mrs. Addie Speight,
Rosemary, N. C.

Father died this morning. Funeral tomorrow, 10:10 a. m.
APPIE O. SMITH."

This message was delivered to the plaintiff at Rosemary, N. C. on the same day with the date changed from 24 January to 23 January, 1918, thus making the telegram read "Father died this morning (i. e. 23 January). Funeral tomorrow (i. e. 24 January)."

Upon receiving this message in the changed form the plaintiff believed that her brother who was the father of the sender of the message died on 23 January and would be buried on the 24th, the date of its delivery, and it was impossible for plaintiff therefore to reach Greenville in time to attend the funeral. If the message had been correctly dated it would have been apparent that the funeral was to take place on January 25th and the plaintiff was thus misled and prevented from attending the funeral. The jury responded to the issues that the message sued on was sent out of North Carolina into Virginia and thence back into North Carolina "for the purpose of fraudulently evading liability under the laws of North Carolina"; that it was "negligently changed in transmission in the manner alleged by plaintiff," and that she was entitled "to recover $100 damages."

The Court set aside the verdict, being of opinion that as a matter of law in no view of the testimony was the plaintiff entitled to recover, and entered a judgment of nonsuit. The plaintiff appealed.

The defendant's appeal is upon the ground that there was no evidence to submit to *it to* the jury upon the first issue whether the message was sent out of the State, through Weldon to Richmond, thence to Norfolk, and thence back through Weldon to Rosemary to evade the State law.

5 The plaintiff's appeal is upon the ground that the Court set aside the verdict as a matter of law because the message upon the evidence was interstate and therefore damages could not be recovered.

George C. Green, J. P. Pippen, Murray Allen, for Plaintiff.
W. E. Daniel, for defendant.

CLARK, *C. J.*:

We do not think it necessary to pass upon the question presented by the defendant's appeal for we deem that as a matter of law this was an intrastate message and hence governed by our decisions, and it is immaterial whether the message was sent through Weldon, N. C. to Richmond, Va. and thence to Norfolk, Va., and thence back through Weldon, N. C. to Rosemary, N. C. in order to evade the North Carolina laws applicable to the transmission of messages of this nature in intrastate commerce, or whether this remarkable circumlocutory method of transmission was due solely to the method which the defendant corporation had adopted for its own convenience in transmitting messages from Greenville to Rosemary. Both these points are in this State and the defendant has a continuous line entirely in this State and in operation from Greenville to Rosemary. It transmits messages from Greenville to Weldon (67 miles) without going through Richmond, and it transmits messages from Weldon to Rosemary without sending them through Norfolk. It could have transferred this message at Weldon, N. C., and it did not make this an interstate message because the corporation chose to forward it to Richmond, Va. thence to be sent back through Norfolk, Va. to Rosemary, N. C.

It could as well have sent the message to Raleigh to which it has a direct line and there to be transferred to Rosemary, to which point there is also a direct line from Raleigh, all in this State.

It was the defendant's own method, adopted for its own convenience, or according to the notions of some superintendent, that there were two transfers made at Richmond and at Norfolk, both in another State, instead of by the natural method of one transfer point either at Raleigh or Weldon, both in this State.

6 If the defendant saw fit to adopt business methods requiring this remarkable system of making three transmissions each of greater length than the entire distance from Greenville to Rosemary, i. e. Weldon to Richmond, Richmond to Norfolk, and Norfolk to Rosemary, it does not concern the plaintiff, provided the message was delivered with promptness, and without this error in transmission, which was doubtless caused by the additional relays required by this system of transmission.

If a package were sent by mail route or by stage, or by wagon, from Greenville to consignee in Rosemary, there being a continuous route between the two points in such condition that it did not require the wagon or stage coach to go through Virginia to get from Greenville, N. C. to Rosemary, N. C., this would be an intrastate transaction and the fact that the carrier chose that roundabout method of making the transportation through another State would not make this interstate commerce.

Frequently cars are put into "through trains" which rarely stop to cut out cars. If a carload of tobacco were shipped from Greenville to Rosemary, there being, as there is, continuous rail connection between the two points this would not become interstate commerce because the R. R. Company being reluctant to cut out the car at Weldon should for its own convenience carry it on to Richmond, thence send it to Norfolk and then again tranship it from Norfolk through Weldon to Rosemary. The convenience or the whim of the carrier does not repeal the jurisdiction of the State over matters retained by it in its grant of interstate commerce to the Federal Government.

If the jurisdiction of the State depends upon the method which the telegraph company shall see fit to adopt in the transmission of messages from one point to another in the State, the State laws could be repealed entirely and doubtless would be, by the defendant telegraph company simply sending every message between two points in this State to a point outside the State and thence back into North Carolina, for it would be almost impossible to prove that this was done to evade the State jurisdiction since no one but the defendant and its agents can know its motive. The question is not the

7 motive of the defendant in shifting around its messages in this most extraordinary manner, but whether it has a direct line between the two points, which is in regular use and not out of repair and which can be used without carrying the message to another State and thence back into this State. It is not a question of motive, nor of what method the defendant prefers to do its business, nor of red tape, but simply a question of fact whether the initial and

terminal points are in this State and whether there is a direct telegraph line between the two points, in good condition and in use over which the message can be transmitted without passing through another State. If so, it is an intrastate message whether it is actually sent through another State or not.

If commerce is between two points in the same State the jurisdiction of the State over it is protected by the Federal Constitution by which jurisdiction of interstate commerce is given to the Federal Government, and which provides that all power and authority not therein conferr. is reserved to the several States. Whether commerce between two points in the same State is intrastate depends primarily upon whether both termini are in this State and the only exception is when it is necessary to cross through the territory of another State in passing from the initial point in this State to the terminal point also in this State. This was held by Shepherd, C. J., in Comrs. v. Telegraph Co., 113 N. C., 222, affirming the ruling of the Railroad Commission to that effect.

In Leavell v. Telegraph Co., 116 N. C., 220, this Court affirmed the last cited case, saying:

"In R. R. Commission v. Telegraph Co. (Albea's case), 113 N. C., 213, the Court held that telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by Fuller, C. J., in R. R. v. Pennsylvania, 145 U. S., 192. To the same purport, Campbell v. R. R., 86 Iowa, 587."

In Bateman v. Tel. Co. the message was transmitted from Hertford, N. C. to Plymouth, N. C., and there being no direct telegraph line entirely in North Carolina from Hertford, N. C. to Plymouth, N. C., the message was necessarily sent through Norfolk, Va. and thence to Plymouth, and the Court held that if this was done in good faith it was an interstate message, but that is not the case here, where there is a complete line of wire running from Greenville to Rosemary entirely in the State. The Bateman case did not present the anomalous situation which we have here of the message going through Weldon in this State to Richmond, Virginia, thence to Norfolk, Virginia, and thence back through Weldon, N. C. to Rosemary, N. C.

In R. R. v. Pennsylvania, 145 U. S., 192, it was held that transportation from one point in a State to another point in the same State, but passing through part of another State could be taxed by the State, and is not a tax upon interstate commerce. This was a unanimous opinion and written by Chief Justice Fuller. To same effect Sewell v. R. R., 119 Missouri, 222; Campbell v. R. R., 86 Iowa, 587; S. c., 17 L. R. A., 443. In R. R. v. R. R. Comrs., 106 Fed., 253, it was held, citing the above cases and Commissioners v. Tel. Co., 113 N. C., 213, that "Where the course of transportation between two points in the same State—must be for a considerable part

of the distance through another State" it is interstate commerce. This seems to be the modification, or rather interpretation of the doctrine of the three cases named. Certainly it is the only reasonable limitation.

It has also been held that where a telephone line extends into another State this does not exempt it from State control in respect to persons and service and rates for persons within the State.

9 Tel. Co. v. Falley, 118 Indiana, 201.
Tel. Co. v. Bradbury, 106 Indiana, 1.
Hockett v. State, 105 Indiana, 201.
31 L. R. A., 807 N.
60 L. R. A., 646 N.

In Tel. Co. v. Reynolds, 100 Va., 459; S. c. 93 Am. St., 971, it was held:

"Where the initial and terminal points are both in the same State and the telegram is transmitted over the wires of the same company and concerns only the citizens of that State, the message is a domestic message and its character in that respect is not altered by the circumstance that the line passes in part over the territory of another State, nor is it affected by the fact that the company has established a relay office in such other State. The statute deals with the company, not its agents. The company in this case undertook to transmit the message from one point to another in Virginia, and it cannot escape the penalty imposed by statute for its dereliction of duty on the theory that the statute has no extra territorial effect."

The same doctrine of this case was reaffirmed in Tel. Co. v. Hughes, 104 Va., 240, though that was subsequent to Hanley v. R. R., 187 U. S., 617, in which it was held that where the continuous transportation of goods between two points in this State passes over a "route" a large part of which is outside the State this is interstate commerce.

The case of Hanley v. R. R., 187 U. S., 617, is not in conflict with what is said above. That merely holds that when goods were transported on a through bill of lading from Fort Smith, Arkansas, to Grannis, Kansas, over respondent's railroad, a direct route running by way of Spiro, Indian Territory, a total distance of 116 miles, of which 52 miles are in Arkansas and 64 miles in Indian Territory, this is interstate commerce and the State of Arkansas cannot interfere in opposition to a regulation of Congress. This case certainly does not justify the extraordinary proposition sought to be built upon it that it puts it in the power of any State or Telegraph Co. to destroy the right of the State to regulate intrastate commerce whenever it can by any device, however, unnecessarily, divert transportation or transmission of a telegram, through another State. It is admitted here that this message could have been sent entirely in N. C. more directly from Greenville to Rosemary, but it is alleged that it was contrary to the defendant's business methods to do so.

In R. R. v. Leibengood (Kansas) 28 L. R. A., (N. S.), 985, it was held that where the line passes from one point in a State to another

point in the same State but a part of the route passes over the territory of another State, this is interstate commerce. This case (1910) has there full citation of authorities an examination of which will show that when the route necessarily passes over-the territory of another State this is interstate commerce, but none of them held that in a case like this where both points are in the same State, and there is a line of R. R. or of telegraph between those points which can be used that it becomes interstate commerce because the corporation sees fit to arrange its method of transportation or of transmission so as to make a wide detour through another State and then back into this State.

Most certainly we cannot concur in the proposition. But if the purpose was apparent to avoid the doctrine as to mental anguish as applied in this State and to place itself under the doctrine of the Federal Courts, this alone would not be unlawful, and if such an intent could be declared contrary to law, it would not subject the defendant to liability as motive, intent, or purpose, however reprehensible (if) not connected with some wrongful act cannot be the subject of a civil action. It is not a question of making the defendant company indictable, or liable for a civil action in transacting its business by sending it through another State, and then back into this State, but whether it can by so doing oust the jurisdiction of this State over intrastate commerce which was reserved to it when
11 in the compact at Philadelphi in 1787 the States agreed to confer upon the Federal Government jurisdiction over interstate commerce, but reserved to themselves jurisdiction over intrastate commerce and all other matters not expressly conceded to the Federal Government.

The 10th Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved by the States respectively or to the people." The power over interstate commerce conferred on the Federal Government is in Art. 1, sec. 8, clause 2, as follows: "To regulate commerce with foreign nations and among the several States, and with the Indian Tribes." The line between the "State's Rights" and Federal Rights has often been the subject of dispute, and has not yet been clearly marked and run in every particular. There is, unfortunately, still a "Twilight zone," but it is beyond dispute that while the Federal government has control over interstate commerce, the State has never granted it control over intrastate commerce, and when the transaction is between two points in the same State and there is a continuous road or railroad or telegraph line between those points in good condition capable of being used, transportation and transmission between those points cannot be made interstate commerce by the company's method of doing business, "when the purpose is apparent to avoid the doctrine as to mental anguish as applied in this State, and to place itself under the doctrine of the Federal Court." If this were true, if this were admissible, the line between State's Rights and Federal Rights is not that drawn by the Constitution of the United States, but is nullified by the fraudulent purpose of the corporation to evade the lawful jurisdiction of the State which incorporated the defendant, gave it the right to do business here, and protects it and its officials and its property from violence. This doctrine would make the

pecuniary interest of a money making corporation supreme and the powers of the people in governing the State under its own laws (within the limits of the Federal and State Constitutions) entirely secondary to the evasive and fraudulent conduct of a private corporation.

12 Surely the State authority cannot be made "null and of no effect" in that manner. The creature that the State has made cannot be more powerful than its creator, like another Frankenstein.

The establishment of relay offices in another State in order to evade the laws of this State or even if only to facilitate its business is not a "necessary part" of the transmission of the message, except to the extent that it may avoid the jurisdiction of the State Court, or possibly be some economy in the transmission of the message. Certainly the defendant could not evade the 25c. limit prescribed by the statute of this State for a message between two points and charge in lieu thereof the rate for a message from Greenville, N. C. to Richmond, Va., plus the rate from Richmond, Va., to Norfolk, plus the rate from Norfolk, Va., to Rosemary, N. C., thus making three messages out of one. This demonstrates that there is but one message in law and that is from Greenville, N. C., to Rosemary, N. C., for which the telegraph company can charge only the State limit of 25c. for 10 words, and subject to the State law for damages for negligence in the transmission of said message.

It may be that the error was made by the operator at Greenville, N. C., or by the operator at Rosemary, N. C. No one knows, but the liability of the company is the same and is not less because it saw fit to send the message by such a remarkable roundabout way. It is therefore possible and probable that in the multitudinous and circumlocutory manner of handling this message, the error may have been made at some point outside the State.

Besides the order setting aside the verdict as a matter of law was erroneous for it found necessarily as a matter of fact that this method of sending the message out of the State relaying it at Richmond and again at Norfolk, and then back into the State, was not for evasion, whereas the defendant having a direct, continuous line between Greenville and Rosemary one-tenth of the distance and requiring only one relay at Weldon, the burden was on the company to show at least that this was not done to evade the jurisdiction of the

13 State whose laws give damages for negligence in a case like this from which the company is exempted if it can make this an interstate message by this device.

There was error in setting aside the verdict. If the first issue had been material there was evidence to sustain the finding of the jury. The ground on which the Court set the verdict aside and entered a nonsuit was because it held that upon the face of the evidence this was an interstate message, which we do not think was correct. But even if the finding upon the first issue was set aside, the other two issues left standing (as well as upon the finding of the first issue) the judgment should be entered in favor of the plaintiff, and the case must be remanded for that purpose.

Reversed.

Allen, J., Dissenting.

Petition to Rehear.

(Title of Cause.)

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of North Carolina:

Your petitioner the Western Union Telegraph Company, defendant in the above entitled action, wherein both the plaintiff and the defendant appealed from the decision and ruling of the Court below, respectfully requests the Court to rehear the said case upon both appeals; and your petitioner assigns the following errors which it respectfully submits were committed by the Court in the opinion rendered in said case, viz:

1. The Court erred in holding as a matter of law that the telegraph message referred to in the complaint, which was the basis of the plaintiff's action, was an intrastate message; and the Court erred in refusing to sustain the ruling of the Court below to the effect that upon the undisputed evidence in the case, the said message was an interstate message, and that the plaintiff was not entitled to recover in any aspect of the case.

2. The Court erred in not affirming the judgment of nonsuit on the plaintiff's appeal.

14 3. The Court erred in reversing the judgment of the court below upon the plaintiff's appeal, and in directing the court below to enter judgment for the plaintiff upon the verdict.

4. The Court erred in holding that there was evidence sufficient to sustain the verdict of the jury in response to the first issue.

5. The Court erred in failing and refusing to pass upon the questions presented by the defendant's appeal, and in failing and refusing to sustain the exceptions presented by the defendant's appeal, viz:

(1) The first exception to the ruling of the Court in submitting the first issue.

(2) The second exception upon the refusal of the Court at the close of the plaintiff's evidence, and at the close of all the testimony, to grant the motion of the defendant to nonsuit the plaintiff.

(3) The exception of the defendant to the charge of the Court in leaving it to the jury to find from the evidence that the message was sent out of the State of North Carolina, through the State of Virginia, for the purpose of fraudulently evading liability under the laws of the State of North Carolina.

(4) In refusing to grant the defendant's request for peremptory instructions, as shown by the defendant's fifth exception.

Fundamental Facts to be Considered.

Preliminary to our effort to point out specifically the errors complained of, we wish to call the attention of the Court to some fundamental facts connected with operating the business of a telegraph company.

It will doubtless be conceded that it is the duty of a telegraph company engaged in the transmission of messages to deliver messages as quickly as is reasonably possible and with as much economy as is reasonably possible.

If there is a direct connection between two points, a message can be sent as quickly over a long distance as over a short distance. If there is a direct wire from Raleigh to New York, a message
15 can be transmitted as quickly from Raleigh to New York as it can from Raleigh to Cary.

It is a practical impossibility for the telegraph company to have direct wires connecting all points within the State of North Carolina. If the company should undertake to construct direct wires so that there might be direct communication between all points within the State, without having any messages relayed, it would necessitate the construction of innumerable wires at an enormous cost, and this extra cost would, of course, increase the rates which the company would be entitled to charge for the transmission and delivery of messages.

Relay Stations Necessary.

This brings it about that it is a practical necessity for the company to establish what are known as relay stations. Into these relay stations run a large number of wires connecting a large number of telegraph stations directly with the relay station. A large number of operators are employed at these relay stations, and facilities are there afforded to have a message that comes into the relay station upon one wire and received by one operator, transferred in the relay station over to another operator to be sent over another wire to its destination.

It is also true that the company is under the practical necessity of having quite a large number of relay stations, and quite frequently a message must be transmitted through two or more relay stations before it reaches its destination.

As it is impossible to have direct connection between all points, the desideratum is to transmit a message to the relay station where there are operators who can quickly transfer the message to another wire and thus speed it forward.

The establishment of these relay stations is a matter that requires the utmost skill of the highest experts of the company. It is not, as the Court assumed in this opinion, a mere matter of convenience for the company, but these experts are compelled to take into consideration the location of all the stations and wires of the com-
16 pany in certain territory, the volume of business at each station, and then map out the whole territory and fix the points

at which the relay stations shall be established so as to enable the company to handle messages with the greatest despatch and economy.

These plans and maps are made in the first instance by the experts for a given area, but must of necessity be transmitted to the general office in New York where they are gone over by the foremost experts which the company can employ. In the head office in New York there are large revolving maps covering the whole territory in which the company does business, and a large force of expert employees are going over these maps every day and making changes such as are deemed necessary or proper from time to time.

We are making these statements to the Court so that the Court may see the absolute necessity for the establishment of these relay stations, and that the Court may also see that it is not a mere matter of whim or convenience, but is a matter that requires the most careful and painstaking planning and mapping.

It will appear from this that although a wire may pass through a certain office, and although it may be possible at such office to "cut in" on this wire, yet if the station in question is not a relay office, it is not feasible to have messages taken off such wires at such stations. In many instances, the wires run through a large number of stations solely for testing purposes; that is, to enable the company in case of trouble on the wires to locate as quickly as possible where the trouble is.

This method of doing business obtains not only with telegraph companies doing a commercial business over the wires, but also with railroad companies that do no commercial business over the railroad wires, but do railroad business exclusively.

For example: The United States Railroad Administration at this time in sending railroad messages over the railroad wires from Washington to Charlotte, N. C. sends these messages over a wire
17 that runs through the Charlotte office, down to Atlanta, and the message is then sent back to Charlotte. It is possible to cut in on this wire at Charlotte and take a message off without sending it to Atlanta, but the Railroad Administration finds that there is not enough business between Washington and Charlotte to require the services of an operator at Charlotte, but there is enough business between the Atlanta office and the Charlotte office to require a special operator in Atlanta to take charge of the Charlotte wire. The Railroad Administration, therefore, established Atlanta as a relay point for messages to Charlotte, and, as stated, above, transmits the messages over a wire running through the Charlotte office to Atlanta and then back to Charlotte.

The Facts in this Case.

The facts in this case are undisputed and show the following:

1. It was impossible to have transmitted the message in question from Greenville to Roanoke Rapids without using interstate agencies.

The evidence of the plaintiff's witness Williamson shows that it was impossible for the Greenville operator to get the Weldon opera-

tor without first calling the Richmond operator. Williamson testified: "If Greenville wanted Weldon, she would get Richmond to tell Weldon to answer Greenville. They would have to call Richmond first and ask Richmond to call Weldon and to tell Weldon to answer the Greenville call. This has been the custom ever since I commenced to work, I know, nearly ten years."

2. The message in question, by the undisputed evidence, was sent the quickest way that it was possible to send it. The plaintiff's witness Williamson testified again: "The way by Richmond would be the quickest way, that is, with the wires arranged as they are now, and they have been arranged that way ever since I have been an operator."

3. Norfolk, Va. was the proper relay point for Roanoke Rapids. The plaintiff's witness Williamson testified: "Norfolk is a relay point for Roanoke Rapids. This has been the custom ever
18 since Roanoke Rapids was established as an independent office."

It appears, then, from the plaintiff's own testimony, that the message in question was sent by the quickest way that it could have been sent, and was sent in the same manner and over the same route that like messages had been sent for more than ten years; that is, long prior to the time before any distinction was made as to the right to recover damages for mental anguish, between interstate and intrastate messages.

Principal Errors Assigned by Petitioner.

The attorneys for the petitioner ask the Court's attention to the following as being the principal errors which we respectfully submit were committed by the Court in the opinion in this case:

1. The Court erred in holding that there was evidence to sustain the finding of the jury on the first issue that the telegram in question was sent outside the State for the purpose of fraudulently evading the State laws and the Court erred in giving any weight whatever to that finding.

2. The Court erred in failing to give effect to the Act of Congress, approved June 18, 1910, putting telegraph companies upon the same footing as common carriers, and in effect providing that only messages whose "transmission" was "wholly within one State" should be exempted from the operation of the Federal law.

3. The Court erred in failing to hold that where a message from and to points in the State is actually transmitted through a relay station outside the State, this constitues interstate commerce, irrespective of the motive which the Company had in thus transmitting the message, and we submit that the Court most certainly erred in failing to hold that when the usual, customary, and quickest way to transmit a message from and to points within one State is through a relay station outside the State, and the message is so

transmitted, this constitutes interstate commerce and makes the message an interstate message.

19 4. The Court erred in basing its reasoning upon cases that had been discredited, distinguished, or overruled by the Supreme Court of the United States, and upon cases arising out of messages transmitted prior to the Act of Congress of June 18, 1910, referred to below.

No Evidence of Intention to Evade State Law.

It is confidently submitted by attorneys for the petitioner that the Court erred in holding that there was evidence to sustain the finding of the jury on the first issue, that the company transmitted the message through Virginia with the purpose fraudulently to evade the State law. It is respectfully submitted that upon a re-examination of the record in this case, there is not a scintilla of evidence to support such a finding, but on the contrary, that all of the evidence, including that of the plaintiff's witness Williamson, shows absolutely that the company had in mind no question of evading the law, but sent this telegram in the same manner that it had been sending telegrams for ten years, that is, prior to the Act of Congress referred to above.

An examination of the opinion of the Court will disclose the fact that this finding of the jury on the first issue apparently had a controlling influence over the Court, and the opinion of the Court was rendered in large part upon the theory that the company was seeking to evade the State law.

Our own contention is (as stated below) that the motive which actuated the company can have nothing to do with the decision of this case, and the authorities cited below fully sustain that view; but we are seeking at the outset of the discussion to have the Court hold that there was in this case no evidence whatever of an intention to evade the State law.

It will be noted that the issue as found by the jury convicts the defendant of fraud. This is certainly a harsh word, and if this Honorable Court finds any element of fraud in the facts of this case, then we submit that it will be easy for many cases to convict persons of fraud.

20 But we waive the question of fraud, and submit that there is no evidence in the case of any intention to evade the State law.

The undisputed evidence, as already stated, shows that this method of transmitting messages was used by the defendant prior to the Act of Congress of 1910, and prior to the time when it made any difference, so far as the recovery of damages was concerned, whether a telegram was intrastate or an interstate message. Inasmuch as the company merely continued to send the message in the same way it had been sending it, how can this Honorable Court permit a jury to find that the message in this instance was sent through Virginia to evade the State law?

The undisputed evidence, including the testimony of the plain-

tiff's witness Williamson, demonstrated beyond a doubt that the message in question was sent the quickest way it could have been sent. How can this Honorable Court permit a jury to find that the defendant sent the message in this way to evade the State law, when, in point of fact, the message was sent the quickest way it could be sent?

Suppose, for the sake of argument, that the message had been sent in the manner that the plaintiff claims it should have been sent, viz., by having Richmond call Weldon and having the Weldon operator transmit the message directly to Roanoke Rapids; and let us suppose that this method of sending the message delayed it for several hours; and let us suppose that the plaintiff had brought this action to recover damages on account of the delay in the delivery of the message. Now, in the trial of such a case, if it had been admitted by the telegraph company that it had a convenient and proper method of sending the message by relaying it through Richmond, and that by sending it that way it could have reached its destination in a few minutes, whereas the company had adopted the method of sending it through Weldon that delayed it several hours, can there be any doubt but that the Court would have held that the company was guilty of negligence in not transmitting it the quickest way, i. e., through Richmond? Under these
21 facts, the attorneys for the petitioner respectfully ask the Court to reverse its former ruling and to hold that there was no evidence in the case of any intention to evade the State law.

The Act of Congress of 1910.

The attorneys for the petitioner here ask the Court's attention to the Act of Congress, approved June 18, 1910, and we quote here a part of Section 1:

"Section 1. The provisions of this act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning * * * of this act * * *, Provided, however, that the provisions of this act shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or territory as aforesaid."

It is apparent from this Act that the members of Congress well understood that messages from and to points within the same State were often transmitted through relay stations in other States, and the language of the Act is carefully worded so as not to have the effect to make such messages intrastate messages. The Act says: "Provided, however, that the provisions of this Act shall not * * * apply to the transmission of messages wholly within one State." Here it is plain that under the Act of Congress, the manner of the

transmission of the message controls the question as to whether the message comes within the purview of the Federal statute.

We call attention here to the fact that the Supreme Court of Kentucky in the case of Western Union Telegraph Co. v. Lee, 192 S. W., 70, alludes to this significant fact, viz., that the Act of Congress refers to the transmission of messages. The Court says: "But
22 the statute in the exempting clause speaks of messages 'transmitted' wholly within one State."

In this connection the attorneys for petitioner ask the Court's attention to the case of Berg v. Western Union Telegraph Co., 96 S. E. 248, decided by the Supreme Court of South Carolina in June, 1918, in which that Court held that a telegram transmitted through a relay point outside the State to another point in the same State was an interstate message and governed by the Federal law pertaining thereto, and in this connection the Supreme Court of South Carolina referring to the proviso in the Act of Congress above quoted, says:

"The words in the proviso to section 1 of the Interstate Commerce Act, 'that the provisions of this act shall not apply to the transportation of passengers or property wholly within one State,' etc., and the words, 'nor shall they apply to the transmission of messages by telegraph, telephone, or cable, wholly within one State,' etc., were intended to declare that the transportation or transmission which was only partly within a State should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities used in the transportation or transmission, located in a particular State, can be subjected to the legislation of that State, but not of any other State. No other reasonable construction can be placed on that section."

Prior to this Act of Congress, there were cases in which the Courts held that messages from and to points in the same State, transmitted outside the State, did not constitute interstate commerce. Of this character is the opinion quoted from at length in the case at bar, rendered by the Supreme Court of Virginia, in the case of Telegraph Co. v. Reynolds, 104 Va., 109, and the later case also of Telegraph Co. v. Hughes, 104 Va., 240. The telegrams in both of these cases arose prior to the Act of 1910. It will appear presently from
23 the citations below that the Supreme Court of Virginia, since the passage of the Act of 1910, has ruled most emphatically that a message transmitted in the manner that the message in the case at bar was sent is an interstate message and controlled by the Federal law. It is significant also that the Supreme Court of Missouri, as will appear by citations below, now holds in accordance with our contention, but the Missouri Court, in Davis v. Telegraph Co., 202 S. W. 2, referring to a former opinion, said:

"We were in error in deciding Hewitt v. Telegraph Co., 172 Mo. App., 272, 157 S. W., 827, by reason of our failing to note that the decisions we relied upon were made under the law as it was before June 18, 1910, when Congress placed telegraph companies under federal regulation."

The Message in Question Undoubtedly an Interstate Message.

The attorneys for petitioner respectfully submit that upon a reconsideration of the facts in this case and the questions involved therein, this Court will necessarily reach the conclusion that this Court should have held that the transmission of the message in question constitutes interstate commerce, and that the message was therefore an interstate message and governed by the federal law.

Counsel for the defendant takes the position that where a message is actually transmitted through another State, although the point of origin and the point of destination are both within the same State, such message constitutes interstate commerce irrespective of the motive which prompted the company in sending the message outside the State.

We refer here again to the proviso in the Act of Congress which exempts from the operation of the federal statute only those messages which are actually transmitted wholly within one State.

We also refer the Court to the case of the Western Union Telegraph Co. v. Mahone, 91 S. E., 157, decided by the Supreme Court
24 of Virginia in January, 1917. In this case the message was sent from Norfolk, Va., to Tye River, in the same State, but was relayed through the city of Washington. It developed in the evidence that it was possible to send the message wholly within the State of Virginia, and it is apparent from the opinion of the Court that counsel for the plaintiff relied upon the same course of reasoning upon which is based the opinion of the Court in the case at bar. The Supreme Court of Virginia, however, held that the Court had nothing to do with motives, but only with facts, i. e., only with the question as to whether the message was actually transmitted through another State. The Supreme Court of Virginia said:

"The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives. A local dealer in intoxicating liquors, who lived in the State of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri River, which was connected by a bridge with Leavenworth, Kansas, transacted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the Missouri River in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The State of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying:

" 'The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from Austin v. Tennessee, 179 U. S., 343, 21 Sup. Ct. 132, 45 L. Ed., 224, and Cook v. Marshall County, 196 U. S., 261, 25 Sup.

Ct., 233, 49 L. Ed., 471. Considered in the light of our
25 former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we can not conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State, suffice to change the nature of the transactions.' Kirmeyer v. State of Kansas, 236 U. S., 568, 36 Sup. Ct., 419, 59 L. Ed., 721.' "

Counsel for petitioner respectfully asks the Court to consider carefully the case of Kirmeyer v. State of Kansas, from which the Supreme Court of Virginia quotes, and the Court is also asked to read the opinion of the Supreme Court of Kansas, which was reversed by the Supreme Court of the United States. See State of Kansas v. Kirmeyer, 88 Kansas, 589 (128 Pac., 1114).

In this connection, too, we refer the Court to the case of Western Union Telegraph Co. v. Bowles, 98 S. E., 645, decided by the Supreme Court of Virginia on March 13, 1919. In that case a message was received at Bassett, Va., destined to Martinsville, Va. The message in question was transmitted from Bassett through the Martinsville office (the point of destination) first to Richmond, Va., and from thence it was sent over another direct wire running through two North Carolina offices before getting to Martinsville. The agent at Bassett testified that the message could have been sent direct to Martinsville. The Supreme Court of Virginia, referring to the Mahone case, supra, said:

"It was contended in the Mahone case, as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this Court held, upon authority, that the interstate character of the message must be tested by the actual
26 facts as to its transmission, and not by the motives of the company; and, further, as a necessary corollary from the decision in the Bolling case, that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of federal control."

In this connection we also refer to the opinion of the Supreme Court of Missouri in the case of Taylor v. Western Union Telegraph Co., 204 S. W., 818, quoted below.

Under these authorities, counsel for the defendant respectfully submits that whenever it appears to the Court that any message about which there is litigation was actually transmitted over wires running through more than one State, this fact is controlling, and the Court can not go into the question of the motives of the company, nor can the Court hold that the message is an intrastate message, although it may appear there was another route wholly within the State over which the message might have been sent.

But even though the Court should hold that a message origina-ing in one State and destined to a point in the same State would not be an interstate message if it were shown that the company had sent it outside the State for the purpose of evading the State law, we nevertheless contend that when it appears, as in the case at bar, that the usual, customary way, and the quickest way for the transmission of a message is through a relay station in another State, then the Court must beyond the cavil of a doubt hold that such message is an interstate message.

Adjudicated Cases Sustaining Our View.

It is respectfully submitted that if this Honorable Court should hold to the contrary, it would not only overrule previous decisions of this Court, but would fly in the face of decisions of the Supreme Court of the United States oft repeated in respect to similar questions arising as to shipments by railroads operating in more than one State. Such a ruling would also put this Honorable Court in an-
27 tagonism to every other appellate court that has passed upon the questions involved in the case at bar.

We give below citations from various courts sustaining the position taken in this petition, and so far as we know, there is no appellate court in the United States that now holds to the contrary.

In this connection, counsel for petitioner wishes again to call the attention of the Court to the undisputed fact which appears in this case by the testimony of the plaintiff's witness Williamson, that it was impossible to transmit this message without the use of interstate instrumentalities, in that the operator at Greenville could not possibly call the operator at Weldon directly, but must necessarily first call the Richmond office and have the Richmond office call the operator at Weldon and tell the Weldon operator to connect his wire with the Greenville wire. It is respectfully submitted that both from the authorities cited below and upon the "reason of the thing," whenever any interstate instrumentalities are used (in this case necessarily), these interstate instrumentalities, whatever they may be, converts the transaction into interstate commerce. The calling of the operator is just as much a part of the transmission of the message as is the act of the operator in putting it on the wire after he is called.

We wish, however, to have the Court to understand that our position is broader than this. We confidently maintain that even though it had been possible for the Greenville operator to have called the Weldon operator direct, yet it was not the usual and customary way of transmitting messages, and the usual and customary way was through Richmond and Norfolk, and the transmission of the message as it was sent constituted interstate commerce and made the message an interstate message.

Our position, plainly stated, is this: Where the telegraph company has the choice of two methods of transmitting a message, one wholly

within the State and the other through a relay station out-
28 side the State, and the company chooses to transmit it out-
side the State, the transmission outside the State constitutes interstate commerce. And this is most certainly true where the route outside the State is the usual and customary way of transmitting the message.

North Carolina Decisions.

Counsel for the petitioner respectfully submits that in rendering the opinion in the case at bar, this Court must necessarily have overlooked the previous decisions of the Court. It is apparent, for instance, in rendering the opinion in case at bar, the Court relied very largely upon the former opinion of this Court in the case of Commissioners v. Telegraph Co., 113 N. C., 222. This case is quoted from at length as announcing the controlling doctrine. It is apparent that this Honorable Court overlooked the fact that Commissioners v. Telegraph Co. has been discredited and practically overruled by the Supreme Court of the United States, and also overlooked the fact that our own Court had in the case of Shelby Ice & Fuel Co. v. R. R. Co., 147 N. C., 66, in effect discredited the ruling announced in Commissioners v. Telegraph Co.; and more particularly overlooked the ruling of this Court in Bateman v. Telegraph Co., 174 N. C., 97, in which this Honorable Court called attention to the fact that the Supreme Court of the United States had especially discredited and in effect overruled Commissioners v. Telegraph Co.

It further appears in the opinion in the case at bar that this Court relied not only upon Commissioners v. Telegraph Co., but also upon Seawell v. R. R. Co., 110 Mo., 292, and Campbell v. R. R., 86 Iowa 587, and Railroad Co. v. Pennsylvania, 145 U. S., 192; and it is respectfully submited that this Honorable Court overlooked the fact that all these cases have been discredited or distinguished by the Supreme Court of the United States, and that our own Court had so declared in previous opinions.

29 In Shelby Ice & Fuel Co. v. R. R. Co., 147 N. C., 66, our Court said:

"The Courts in some of the States have held that, in cases of railroad transportation like that we are considering in this appeal, if the initial and terminal points are in the same State, the transportation does not constitute interstate commerce, though part of the territory of another State may be traversed in making the journey. Campbell v. Railroad Co., 86 Iowa, 587; Seawell v. R. R. Co., 110 Mo., 222. But, in Hanley v. Railway Co., 187 U. S., 617, the Supreme Court of the United States, whose decision we must follow in such cases, held that those cases were decided upon the authority of Railroad v. Pennsylvania, 145 U. S., 192, and in deference to conclusions drawn from that case, which involved only a question of taxation, and that the conclusions of the State courts had been carried too far. Referring to Railroad v. Pennsylvania, Justice Holmes said: 'That was the case of a tax, and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders.'"

The attention of the Court is called to the fact that in the case of the Shelby Ice & Fuel Co. v. Southern R. R. Co., just referred to, this Court held that because the shipment was actually made from Grover via Blacksburg to Shelby, this constituted interstate commerce. It is a matter of common knowledge that the shipment over the Southern Railway from Grover to Shelby could have been made over the Southern Railway lines wholly within the State, viz., from Grover via Charlotte and Statesville to Marion and from Marion to Shelby. This Court did not inquire into the motives of the railroad company in sending the shipment outside the State, nor did the Court advert to the fact that the shipment could have been sent over lines entirely within the State. The sole fact considered by this Court was as to how this shipment was actually made.

30 In Bateman v. Telegraph Co., 174 N. C., 97, in a unanimous opinion, rendered by Mr. Justice Walker, this Court said:

"The authorities to this effect are very numerous and consistent. Shelby Ice & Fuel Co. v. Ry. Co., 147 N. C., 66. In that case we followed Hanley v. R. R. Co., 187 U. S., 617, which finally determined the question in favor of the view that although the two points are in the same State, yet if in the transportation by a carrier any part of the route is in another State, it is interstate commerce. The Court said by Justice Holmes, quoting and adopting the rule stated by Justice Fields, on the circuit, in P. C. Steamship Co. v. R. R. Comrs., 9 Sawyer 253 (18 Fed. Rep., 10), and also citing Lord and Goodall, 102 U. S., 541: 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' With reference to these words, Justice Holmes said: 'We are of opinion that the language which we have quoted from Mr. Justice Fields is correct.' Other cases cited by that Court are State ex rel. R. R. Warehouse Co. v. Chicago, etc., R. R. Co., 40 Minn., 263 (3 L. R. A., 238); Sternberger v. Cape Fear, etc., Ry. Co. 29 S. C., 510 (2 L. R. A. 105; 7 S. E. Rep., 836), and M. P. Protective Association v. Delaware, etc., R. R. Co., 7 Interstate Com. Rep., 92, 160, 161.

"The Court criticized certain cases in conflict with the views expressed in the Hanley case, and virtually overruled them, as to this question, for it states that they were based upon a misconception of the real question and the true decision thereon in L. V. R. R. Co. v. Pennsylvania, 145 U. S., 192, and adds: 'We are of opinion that they carry their conclusions too far.' Among those cases is State ex rel. R. R. Comrs. v. W. U. T. Tel. Co., 113 N. C., 213. At any rate, the result in the Hanley case was to hold that if any part of the route was in another State than that where the shipment or

31 the message started, it was interstate commerce, and the liability of the carrier or telegraph company must be determined according to the Federal law. This doctrine is supported by a large number of cases, which are cited in defendant's brief. This rule applies to telegraph companies engaged in interstate business, they being instruments of commerce protected by the Federal law. W. U.

Tel. Co. v. James, 162 U. S., 650; Same v. Pendleton, 122 U. S., 347; Same v. Brown, 244 U. S., 542."

It is respectfully submitted that the opinion in the case at bar puts this Honorable Court in the position of relying upon the reasoning in cases which have been expressly discredited, overruled or distinguished both by opinions of this Court and also by opinions of the Supreme Court of the United States.

United States Supreme Court Decisions.

It appears from the opinion of the Court in case at bar that the Court relied largely upon R. R. Co. v. Pennsylvania, 145 U. S., 192, and it is apparent that in rendering the opinion this Honorable Court overlooked the fact that the Supreme Court of the United States in the case of Hanley v. R. R. Co., 187 U. S., 617, had expressly called attention to the fact that the decision in R. R. v. Pennsylvania did not warrant the conclusions which were reached by this Court in the opinion in the case at bar.

In the opinion in the case at bar there is an able discussion of the question of interstate commerce from a constitutional standpoint, and counsel for the petitioner do not undertake to combat this able reasoning of the Court, but only desire to call the attention of the Court to the fact in construing the provisions of the Constitution of the United States, this Honorable Court is necessarily bound by the interpretation placed thereon by the Supreme Court of the United States, however much the conclusions reached by that Court may be at variance with the view of the members of this Honorable Court.

32 Counsel for the petitioner again calls the attention of the Court to the decision of the Supreme Court of the United States in the case of Kirmeyer v. Kansas, 236 U. S., 568, which is quoted by the Supreme Court of Virginia in the case of Western Union Telegraph Co. v. Mahone, 91 S. E. 157, cited above, in which case the Supreme Court of the United States held that even though a shipper transmits his shipment over lines in two States for the express purpose of evading the state law, this would not have the effect to take the case out of the operation of the interstate commerce clause of the Federal Constitution, but that, notwithstanding the motive, the transaction consti-u-ed interstate commerce.

Decisions of the Supreme Court of Virginia.

Counsel for petitioner further call attention to the fact that in the opinion in the case at bar, this Court evidently relied upon the earlier Virginia decisions, and this Court quotes at length from the opinion of the Supreme Court of Virginia in Telegraph Co. v. Reynolds, 100 Va., 459, and also refers to the case of Telegraph Co. v. Hughes, 104 Va., and *his* Court called attention to the fact that the Hughes case was decidled subsequently to Hanley v. R. R. Co. It is apparent from this tlhat this Honorable Court in rendering the opinion in the case at bar clearly overlooked the fact that the cases referred to were undoubtedly decided upon telegrams sent prior to

the Act of Congress of 1910, or, at least, prior to the time that the attention of the Virginia Court had been called to that Act.

In Western Union Tel. Co. v. Bolling, 91 S. E., 154 (decided January 11, 1917), the Supreme Court of Virginia said:

"Inasmuch, however, as under the express provisions of the act to regulate commerce, telegraph and telephone companies are common carriers, these decided cases are conclusive of the question here involved. Since the case of Hanley v. Kansas City, etc., R. R. Co., 187 U. S., 617 (47 L. Ed. 333), there has been no dissent from the
33 proposition that although the point of shipment and the point of delivery are in the same State, if during the course of transportation the property passes without the boundaries of the State, such a shipment is interstate commerce. * * * Upon principle, we can not conceive how any different doctrine can be applied to telegraph messages which, in the course of their transmission, pass without the State into any other State or the District of Columbia," citing many cases.

The foregoing paragraph is quoted with approval by this Honorable Court in the Bateman case.

Also in Western Union Telegraph Co. v. Bowles, 98 S. E., 645, the former ruling in the Bolling case was expressly approved. We have already called the attention of the Court to the fact that in this Bowles case the wire over which the message was sent actually passed through the office at the point of destination, but was relayed out of the State and sent back to the point of destination, and the Supreme Court of Virginia held that the sending of this message in this way constituted interstate commerce.

Decisions of the Supreme Court of Missouri.

In the opinion in the case at bar, as already noted, this Honorable Court relied upon the reasoning of the Supreme Court of Missouri in the case of Seawell v. R. R., 110 Mo. 222. We have already called the attention of the Court to the fact that this Missouri case was discredited and overruled by the Supreme Court of the United States in the Hanley case. It is also apparent that in rendering the opinion in the case at bar, this Honorable Court overlooked the fact that the Missouri Supreme Court, in a telegraph case where the facts are similar to the facts in the case at bar, held that the message was an interstate message. In the case of Davis v. Western Union Telegraph Co., 202 S. W., 292, the Supreme Court of Missouri held that
34 after the Act of Congress of 1910, telegrams originating in and destined to a point in the State of Missouri, but relayed outside the State, constituted interstate commerce, and such a message did not come within the provisions of the penalty statute of the State of Missouri. In this Davis case, the Supreme Court of Missouri called attention to the fact that it had committed error in deciding the case of Hewitt v. Telegraph Co. "by reason of our failing to note that the decisions we relied upon were made under the law as it was before June 18, 1910, when Congress placed telegraph companies under federal regulation."

Later, in the case of Taylor v. Telegraph Co., 204 S. W., 818, the

Supreme Court of Missouri had before it the liability of the company upon a telegram sent from Kansas City, Mo., to Triplett, Mo., and the message was relayed through Omaha, Neb. The plaintiff's evidence, however, showed that there was a wire running from Kansas City to Brunswick, Mo., and from Brunswick to Triplett, "that the operator at Brunswick could turn around in his chair and telegraph the message from Brunswick to Triplett, and that a message could also be sent from Kansas City to Chillicothe, Mo., and from thence telegraphed to Triplett." Here, then, it appears that the telegraph company had three ways to send the message,—two ways over wires entirely within the State of Missouri, and one over a wire relayed at Omaha, Nebraska. The message was actually sent through Omaha, Neb., and the Court held as a matter of law that the transmission of the message constituted interstate commerce. The plaintiff's counsel took the position that the sending of the message through Omaha was to evade the law of the State of Missouri. The Court said:

"Defendant urges that the message was interstate commerce, and therefore not subject to the regulations of this State. Plaintiff urges that it would have been more convenient for defendant to have sent the message through Brunswick or Chillicothe to Triplett than through Omaha to Triplett, and at any rate that the sending of the message outside of the State was evidence of an effort to make it interstate commerce and to thus evade the laws of this State.

"(1, 2) We have carefully examined the record, and we do not find that there was any evidence that it was less convenient or took any greater time to send the message by Omaha than by way of Brunswick or Chillicothe. We do not attempt to say that defendant could avoid the effect of the penalty provided in the statute by purposely sending the message outside of the State in an effort to make it interstate commerce. This case does not present a situation of that kind. The evidence shows that defendant had a choice of two ways of sending the message, one as convenient as the other and requiring as little time as the other, and therefore as direct as the other. There is nothing in the evidence from which a court or jury could say that defendant was attempting to avoid the statute mentioned. We could not go to the extent of holding that where a company has two routes over which a telegram could be sent, one an intrastate and the other an interstate route, each of equal convenience and requiring the same time, and therefore as direct, it must send the message over the intrastate route, and not the interstate route, and that a failure to send it over the former is evidence of an intention to avoid the State statute. Of course, the fact that the origin and destination of the message was in the State of Missouri did not make the message an intrastate one, when its course or route took it outside of the State." Citing numerous cases, including the Bateman case.

Decisions of the Supreme Court of Oklahoma.

Counsel for petitioner calls the attention of the Court to a decision of the Supreme Court of Oklahoma rendered January 9, 1917, in

the case of Western Union Telegraph Co. v. Kaufman, 162
36 Pac., 708. It appeared in that case that a message was sent from Apache, Oklahoma, to Henryetta, and was relayed through Wichita, Kansas. The Supreme Court of Oklahoma, after reviewing the decisions of the supreme Court of the United States and examining the decisions of other Courts, including the decision of the Supreme Court of North Carolina in the case of Shelby Ice & Fuel Co. v. Southern Railway Co., held that the message was an interstate-message and that the federal law applied.

Decisions of the Supreme Court of Kentucky.

Counsel for petitioner calls the attention of the Court to the case of Western Union Telegraph Co. v. Lee, 192 S. W., 70, decided by the Court of Appeals of Kentucky in February, 1917. In this case the message was filed at Lebanon, Ky., destined to Mayfield, Ky. The message was transmitted by way of Louisville, Ky., and Nashville, Tenn. The trial court below treated the message as an intrastate message, and a verdict and judgment were rendered against the telegraph company, from which an appeal was taken.

There will be found in this case an able and elaborate discussion of the whole question. The Court reached the conclusion that the transmission of this message by relaying it through Nashville, Tenn., constituted interstate commerce, and held that the case was bound by the federal law.

Decision of the Supreme Court of South Carolina.

Counsel for petitioner also calls the attention of the Court again to the case of Berg v. Western Union Telegraph Co., 96 S. E., 248, decided by the Supreme Court of South Carolina in June, 1918. In that case the message was sent from Charleston to Richland, S. C., but was relayed through the Savannah office. The South Carolina Court considered the Act of Congress and held that the pro-
37 viso in the Act exempted only those messages which were actually transmitted wholly within one State. The Court relied upon numerous authorities, including the Bateman case, and held that the transmission of the message constituted interstate commerce and that the federal law applied.

Your petitioner states that it has paid the costs adjudged against it in this Court, and that it has therefore performed the only judgment rendered against it in this case.

Wherefore, counsel for the petitioner respectfully request this Honorable Court to rehear the case and upon the rehearing to reverse the former ruling.

This 7th day of November, 1919.

W. E. DANIEL,
TILLETT & GUTHRIE,
Attorneys for Western Union Telegraph Company, Petitioner.

38 In the Supreme Court of North Carolina, Fall Term, 1919, Halifax County.

Nos. 100 and 101.

ADDIE SPEIGHT

against

WESTERN UNION TELEGRAPH COMPANY.

Certificate of Counsel.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of North Carolina:

The undersigned, each of whom has been a member of the bar of this Court for more than five years, do hereby certify as follows:

1. Each of the undersigned certifies that he has no interest in the subject matter of this litigation, and has never been counsel for either party to the suit.

2. The undersigned certify that after carefully examining the case and the law bearing thereon and the authorities cited in the opinion of the court, *and* they are of the opinion that the decision of the Court rendered in said action is erroneous in the following particulars:

(1) The Court erroneously held that the message in question was as a matter of law an intrastate message, whereas the Court should have held upon the facts of the case that the message in question was an interstate message and governed by the Federal law.

(2) That the Court erroneously held that there was evidence to sustain the finding of the jury that the sending of the mes-
39 sage through Virginia was done for the purpose of fraudulently evading liability under the laws of North Carolina.

(3) That the Court erred in failing to hold that whenever a telegram sent from one point in the State to another point in the same state is in the usual and ordinary course of transmission by the telegraph company sent through another State, the sending of such message constitutes interstate commerce, and the transaction is governed by the Federal law, and that there can be no recovery for any mental anguish suffered by anyone on account of any negligent failure to transmit and deliver such a message.

This November 8, 1919.

Respectfully submitted,

W. S. O'B. ROBINSON, JR.
F. M. SHANNONHOUSE.

Nov. 18, 1919.

12—712

The Justices failing to agree, this petition is denied.

BROWN,
Justice.

Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of the record and all proceedings of this Court in the case entitled, Addie Speight v. Western Union Telegram Company, as appears from the originals on file in this Court,—the same consisting of three parts, viz., (1) Transcript of plaintiff's appeal; (2) transcript of defendant's appeal; and (3) transcript of all proceedings had in this Court.

Witness my hand and seal of this said Court at office in Raleigh, this 26th January, 1920.

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

40 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of the record and all proceedings of this Court in the case entitled, Addie Speight vs. Western Union Telegraph Company, as appears from the originals on file in this Court,—the same consisting of three parts, viz., (1) Transcript of plaintiff's appeal; (2) transcript of defendant's appeal; and (3) transcript of all proceedings had in this Court.

Witness my hand and seal of said Court at office in Raleigh this 26th January, 1920.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

41 In the Supreme Court of North Carolina, From Halifax County.

No. 100.

ADDIE SPEIGHT

vs.

WESTERN UNION TELEGRAPH COMPANY.

Plaintiff's Appeal.

No. 101.

ADDIE SPEIGHT

vs.

WESTERN UNION TELEGRAPH COMPANY.

Defendant's Appeal.

Stipulation of Counsel.

It appearing that the Supreme Court of the United States has granted a writ of certiorari addressed to the Supreme Court of North Carolina in the above entitled case, directing the Supreme Court of North Carolina to certify to the Supreme Court of the United States the record and proceedings in the said action to the end that the same may be reviewed by the Supreme Court of the United States:

It is now agreed between the attorneys of record for the plaintiff, Addie Speight, and for the defendant, the Western Union Telegraph Company, that the record already certified and attached to the petition for certiorari, may be treated as the response to the writ of certiorari, and may be accepted by the Supreme Court of the United States as the true and full record and proceedings in the above entitled action.

This March 16th, 1920.

MURRAY ALLEN,
Counsel of Record for Addie Speight, Plaintiff.
CHARLES W. TILLETT,
Counsel of Record for Western Union Telegraph Company, Defendant.

42 I, Joseph L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify that the foregoing is a true copy of the stipulation of counsel entered in the above entitled action lately pending in this Court.

Witness my hand and seal of the Court this 19 day of March 1920.

[Seal Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of Supreme Court, State of North Carolina.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Being informed that there is now pending before you a suit in which Addie Speight is appellant, and Western Union Telegraph Company is appellee, No. 100; and Western Union Telegraph Company is appellant, and Addie Speight is appellee, No. 101, which suit was removed into the said Supreme Court by virtue of appeals from the Superior Court of Halifax County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and re-
44 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

45 [Endorsed:] File No. 27,467. Supreme Court of the United States. No. 712, October Term, 1919. Western Union Telegraph Company vs. Addie Speight. Writ of Certiorari.

46 [Endorsed:] File No. 27,467. Supreme Court U. S. October Term, 1919. Term No. 712. Western Union Telegraph Co., petitioner, vs. Addie Speight. Writ of Certiorari and Return. Filed March 20, 1920.

No. --------

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,
against
ADDIE SPEIGHT, RESPONDENT.

PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of the Western Union Telegraph Company respectfully shows:

NATURE OF THE CASE.

This is an action originally brought in the Superior Court of Halifax County, North Carolina, by Addie Speight, the plaintiff therein, to recover of the Western Union Telegraph Company, defendant therein, damages for mental anguish alleged to have been sustained by the plaintiff, arising out of her failure to attend the funeral of her brother. The plaintiff alleged that her failure to attend the funeral was caused by the negligence of the Telegraph Company in changing the date of the telegram sent to her announcing the death of her brother, John Smith, and giving the date of his funeral. The change in the date of the telegram made it appear that the funeral took place on the day the telegram was received instead of on the following day, as appeared in the original message.

The jury rendered a verdict on all of the issues in favor of the plaintiff, and awarded the plaintiff one hundred dollars ($100) damages for the mental anguish suffered by her. The trial court set aside the verdict as a matter of law and not as

a matter of discretion, and entered a judgment of involuntary nonsuit against the plaintiff. The plaintiff appealed to the Supreme Court of North Carolina, and that Court held that the trial court had erred in setting aside the verdict and that the verdict should be allowed to stand as rendered by the jury. The Supreme Court thereupon issued its mandate to the lower court to enter judgment for the plaintiff upon the verdict rendered. In the opinion rendered by the Supreme Court of North Carolina, which appears in the record hereto attached, the Supreme Court disposed of all of the questions involved in the case and left nothing for the lower court to do except to enter judgment upon the verdict according to its mandate.

Main Point Involved in the Case.

The main point in the case is whether the telegraphic message in question is to be considered as an intrastate message so as to render the Telegraph Company liable to the plaintiff for damages arising out of mental anguish, or whether the message is to be considered as an interstate message—that is, whether it constitutes interstate commerce. If it is held to be an interstate message, then it is admitted that the plaintiff is not entitled to recover damages for mental anguish, which is the sole damage claim, and it is also admitted that the action should be dismissed. The message was sent from Greenville, North Caorlina, addressed to the plaintiff at Rosemary, North Carolina. It appeared in the case that Roanoke Rapids was the delivery point for telegrams destined for Rosemary, there being no telegraph office at Rosemary.

It is set up in the answer of the defendant, and it is admitted in the replication of the plaintiff, quoted above, that the message in question was actually transmitted from Greenville, N. C., through Richmond, Va., and Norfolk, Va., to Roanoke Rapids—that is, it is admitted that interstate commerce was utilized in the actual transmission of the message.

The undisputed evidence showed that the route used in

the transmission of the message—that is, through Richmond and Norfolk, Va., relay stations—was the route which had been actually used in the transmission of like messages for more than ten years.

The undisputed evidence showed that there was no direct and continuous wire from Greenville, N. C., to Roanoke Rapids, the telegraph station for Rosemary.

There was no allegation or proof that there was any delay in the delivery of the message, and all of the evidence showed that the route over which the message was actually sent was the quickest way to send the message from Greenville to Roanoke Rapids.

In other words, the question presented to the Court in this case, concisely stated, is this:

Where a telegraphic message orginates at one point in a State, destined to another point in the same State, is actually transmitted over the route which is usual and customary in the transmission of messages between these two points, and this causes the message to be transmitted over wires and through relay points in another State, is such a message thus transmitted an interstate message—that is, does it constitute interstate commerce?

Proceedings in Trial Court.

The pleadings in the cause, and particularly the answer of the defendant, which appears in the record, shows that the defendant particularly set up as a defense that the message was transmitted over the usual and customary route for the transmission of messages from Greenville to Roanoke Rapids (Roanoke Rapids being the delivery point for Rosemary), this route being from Greenville to Richmond, Va., a relay point, thence to Norfolk, Va., another relay point, and thence to Roanoke Rapids, and that the message was therefore an interstate message—that is, that the transmission of the message constituted interstate commerce.

The defendant further set up the Act of Congress of June

18, 1910, by which Congress provided that the United States should enter upon and assume charge of the regulation of the field of interstate commerce by telegraph, and the defendant set up that it had complied with the Act of Congress.

The defendant further set up that the message in question was an *unrepeated message*, sent subject to the conditions on the back of the telegram.

The following issues were submitted to the jury and answered as follows:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

Answer: "Yes."

2. Was the message negligently changed in transmission by the defendant?

Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover?

Answer: "$100."

Counsel for the Telegraph Company during the progress of the trial and in apt time moved for judgment of nonsuit, which the trial court at that time overruled, and the defendant's counsel also moved for peremptory instructions directing the jury to answer the first issue "No," and the third issue "Nothing." Counsel further requested the Court to charge the jury that inasumch as this was an unrepeated message, in no event was the plaintiff entitled to recover more than the charge for sending the telegram.

The trial Court submitted all the issues to the jury under the charge which is fully set out in the record and attached hereto, but after the rendition of the verdict defendant's counsel moved to set the verdict aside and moved for judgment of nonsuit, basing the motion upon the ground that the message in question constituted interstate commerce, and that the plaintiff was not entitled to recover any damage whatever for mental anguish.

The trial Court reconsidered the matter after the render-

ing of the verdict, and thereupon the judge presiding signed a judgment setting aside the verdict as a matter of law and adjudged that the plaintiff be nonsuited.

Thereupon both the plaintiff and the defendant appealed to the Supreme Court of North Carolina. The plaintiff appealed from the judgment rendered against her, and the defendant out of an abundance of caution and in accordance with the practice obtaining in North Carolina, in order to bring up for review the rulings of the Court during the progress of the trial.

The contention of the petitioner is that inasmuch as the pleadings in the case, and particularly the replication filed by the plaintiff, admit that the telegram in question was actually transmitted through two States, this was an admission that the transmission of the message constituted interstate commerce. The petitioner further contends that the findings of fact by the jury on the first issue and the statements of fact upon which the Supreme Court of North Carolina based its ruling, are unsupported by any testimony in the case, and for that reason it may become necessary for this Honorable Court to examine into the facts, under the ruling in *Creswell v. Grand Lodge Knights of Pythias*, 225 U. S., 246, to the effect that wherever it is claimed that a federal right has been denied as a result of the findings of fact, and it is contended that there was no evidence in the case to support the findings, then it becomes the duty of this Court to examine the record in the case to ascertain whether there was any evidence to support the findings of fact.

Conceding, then for the sake of argument, and for that purpose only, that the facts stated below are material, we now show the Court that by the undisputed evidence these facts are established:

1. *That the message in question was actually transmitted from Greenville, N. C., through Richmond, Va., and Norfolk, Va., to Roanoke Rapids, the telegraph station for Rosemary.*

2. *That the route over which the message was sent was the*

usual and customary route for the transmission of messages between these points and was the route which had been used for many years.

3. *The route over which the message was transmitted was the quickest way in which it was possible for the Telegraph Company to have transmitted and delivered the message.*

4. *That there was no direct and continuous wire over which the message could have been transmitted wholly within the State of North Carolina; that in any event it would have been necessary to relay the message at Weldon, which was not a relay station, and the relaying of the message at Weldon would have retarded the transmission and delivery of the message.*

5. *That there was no evidence to support the finding of the jury that the message was sent through Virginia for the purpose of fraudulently evading the law.*

Evidence Briefly Analyzed.

As bearing upon these questions there were but three witnesses, one for the plaintiff, C. E. Williamson, and two for the defendant, E. M. Kilpatrick and J. L. Bundy.

Plaintiff's witness Williamson's testimony will be found on pages 18-20 of the record in defendant's appeal. This witness testified on his direct examination that there was a route to send the message direct from Greenville to Weldon, and from Weldon to Roanoke Rapids, yet on his cross-examination he distinctly and clearly stated that to send the message from Greenville via Weldon to Roanoke Rapids was not the quickest and promptest route, although it was the most direct. He explained that if the Greenville operator wanted the Weldon operator, the Greenville operator would first have to call the Richmond operator, ask the Richmond operator to call the Weldon operator, and the latter would then "cut in" on the Roanoke Rapids wire. The witness explained that the manner in which this particular telegram was sent—that is from Greenville to Richmond, Richmond to Norfolk, and Norfolk

to Roanoke Rapids—had been the custom ever since he had known anything about it, which was ten years; that Norfolk was the relay point for Roanoke Rapids.

Defendant's witness Kilpatrick (record, page 41) testified clearly as to the necessity from a practical standpoint of sending the message exactly as it was sent, and testified that it was not possible under the system adopted by the Company for the message from Greenville to Roanoke Rapids to go other than through Norfolk. He testified further that this had been the custom of the Telegraph Company as long as he had been in the business, for at least seventeen years.

Defendant's witness Bundy explained in detail the necessity for sending the message as it was sent. He explained fully the nature of the relay offices and the necessity for having them in order to avoid congestion.

All of the witnesses in the case, both for the plaintiff and the defendant, testified most positively that the way in which the message was sent was the quickest way to send it, and was the route that had been in use for from ten to seventeen years.

There was not a line of testimony from any witness showing that the Company adopted this method from any motive to evade the State law, and not a line of testimony upon which any charge of fraudulent evasion could be based.

The respondent's counsel seemed to rely upon the fact that the wires over which the message was transmitted went through the Weldon office, both in going to Richmond and also in being transmitted from Norfolk to Roanoke Rapids, but in this connection your petitioner wishes to emphasize that all of the evidence in the case shows that these wires going through the Weldon office were there *for test purposes only*, and were not intended to be used by the Weldon operator for receiving or transmitting messages. All of the evidence shows that the only possible way the Weldon operator could use these wires was to "cut in" with his plug, and while it was possible for him to do this he was not expected to use these through wires in the transmission of messages.

The other evidence appearing in the case shows that the defendant complied with the Act of Congress and shows that the telegram in question was sent as an *unrepeated message*, subject to several limitations, one of them being that no recovery could be had for more than the cost of the message, but as this action is brought by the sendee there was no claim for the recovery even of the toll paid.

Opinion of the Court Below.

The opinion of the Chief Justice of the Court below seems to have been concurred in by Mr. Justice Hoke. The minutes of the Supreme Court (record, page 1) show that Mr. Justice Walker concurred in the result. Mr. Justice Allen dissented, though he filed no dissenting opinion, and Mr. Justice Brown was absent and did not participate in the hearing or in the decision of the case.

Petitioner filed a petition to rehear, which, under the rules of the Supreme Court of North Carolina, was referred to Mr. Justice Walker and Mr. Justice Brown. This petition to rehear was considered and denied on the 18th of November, 1919, because of the fact that the Justices did not agree, Mr. Justice Brown being of the opinion that the rehearing should be granted, and Mr. Justice Walker deciding that the case should not be reheard.

Your petitioner respectfully submits that there are several statements in the opinion of Chief Justice Clark as to the facts of the case which are wholly unsupported by the testimony. It is stated in the first part of the opinion that there was a continuous and direct route for the transmission of messages from Greenville to Rosemary, but an examination of the evidence will show that the witnesses testified that there was no such direct and continuous route, and that while it was *possible* to relay the message at Weldon, this was not the quickest route and not the route which was in use by the Company.

Crux of the Decision.

The crux of the decision of the Supreme Court of North Carolina is probably found in this extract from the opinion of the Chief Justice:

> "Whether commerce between two points in the same State is intrastate depends primarily upon whether both termini are in this State, and the only exception is when it is necessary to cross through the territory of another State in passing from the initial point in this State to pass to the terminal point also in this State."

Your petitioner respectfully shows to the Court that this is a case of great importance to your petitioner, arising out of the fact that, as appears from the evidence in this case, Richmond, Va., and Norfolk, Va., are relay points for many telegrams originating in North Carolina and destined for other points in the same State. It may be admitted by your petitioner that it is *possible* to send some of these messages upon wires wholly within the State of North Carolina, but, as shown by the testimony in this case, the sending of such messages over wires wholly within the State would cause great delay and congestion and seriously injure your petitioner's business and prevent the quickest transmission of the messages. If the opinion of the Supreme Court of North Carolina is to stand as the law regulating your petitioner's conduct in the transmission of messages from one point to another within the State, it will result in great loss to your petitioner, and will retard and obstruct the quick and prompt transmission of messages between many points.

Your petitioner shows the Court in the brief hereto attached that the opinion of Chief Justice Clark is founded upon decisions that have been discredited and overruled by this Honorable Court and also by a former opinion of the Supreme Court of North Carolina. The petitioner further shows that questions similar to this in the matter of common

carriers of freight have been passed upon by this Honorable Court, and further, that the identical question now submitted to the Court has been passed upon by the Courts of last resort in various States in the United States, and in every instance the opinions of these Courts have upheld the contention now made by your petitioner. It will appear, therefore, that if the decision of the Supreme Court of North Carolina is permitted to remain unreversed, the result will be brought that a message originating at one point in North Carolina and transmitted to another point in the same State through a neighboring State, will be held in North Carolina to be intrastate commerce, while another message originating in some other State and destined to another point in the same State, transmitted through a neighboring State, under identically the same conditions and circumstances, will be held in the other States to be interstate commerce.

It is respectfully submitted by petitioner that it is necessary that this Honorable Court settle the question, not only on account of its importance, but also on account of the fact that the decision of the Supreme Court of North Carolina conflicts with the decisions of so many other courts of last resort.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of North Carolina to the end that the judgment of the Supreme Court of North Carolina may be reviewed and reversed by this Honorable Court.

WESTERN UNION TEL. CO.,
Petitioner.

By FRANCIS R. STARK,
W. E. DANIEL,
CHAS. W. TILLETT,
Counsel for Petitioner.

IN THE SUPREME COURT OF NORTH CAROLINA

OCTOBER TERM, 1919.

No. --------

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

against

ADDIE SPEIGHT, RESPONDENT.

BRIEF OF COUNSEL FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

A Federal question is undeniably involved in this case arising out of the fact that it is admitted in the pleadings and shown by all of the evidence that the message in question was transmitted through the States of North Carolina and Virginia, and the defendant expressly set up in its answer that the transmission of the message in question constituted interstate commerce. The trial judge in the Court below sustained the contention of the petitioner and dismissed the case, but on appeal the Supreme Court of North Carolina by a divided Court held that the message was intrastate commerce because of the fact that it originated at one point in the State and was destined for another point in the same State and could have been transmitted over wires wholly within the State.

The only damage which the plaintiff sought to recover in the Court below was compensation for the mental anguish which it was alleged that she suffered on account of inability

to attend her brother's funeral. Counsel for respondent admits, as we understand it, that if the message in question is an interstate message, then no recovery for mental anguish can be had.

Besides that, it is admitted in the answer that the message is an unrepeated answer and sent subject to all of the stipulations with reference to unrepeated messages, one of them being that no recovery can be had on account of failure to transmit an unrepeated message beyond the tolls paid.

The opinion of this Court in the case of *Postal Telegraph Co., Petitioner, v. Warren-Godwin Lumber Co.,* decided December 8, 1919 (Supreme Court Advance Opinions, No.4, page 95), and the opinion of this Court in the later case of *Western Union Telegraph Co., Plaintiff in Error, v. Peter Boegli,* decided January 12, 1920, hold that the stipulations in regard to unrepeated messages are binding in all cases where the transmission of the message constitutes interstate commerce.

The sole question, then, before the Court in this case, is as to whether the message in question, transmitted from one point in the State of North Carolina over wires and through relay stations in the State of Virginia and back to another point in North Carolina, constitutes interstate commerce.

ARGUMENT.

The opinion of the Supreme Court of North Carolina shows that the Court has disposed of every question involved in the case. The opinion concludes with the words:

> "Judgment should be entered in favor of the plaintiff and the case must be remanded for that purpose."

There was nothing left for the discretion of the trial court, and it can do nothing except to obey the mandate of the Supreme Court of North Carolina and enter judgment for the plaintiff.

When the Court of last resort of a State disposes of all

the questions in a case and remands it with specific instructions to the lower court to enter no judgment, this constitutes a final judgment within the meaning of Sec. 237 of the Judicial Code as amended (Sec. 1214 of U. S. Compiled Statutes).

Rio Grande Railway Co. v. Stringham, 239 U. S., 44, and cases therein cited.

OPINIONS OF THIS COURT DECISIVE OF QUESTION.

It is respectfully submitted that the question raised by this petition has already been foreclosed in this Court in favor of the petitioner.

In the early case of *Western Union Telegraph Co. v. Texas*, 105 U. S., 460, this Court held that a telegraph company transmitting messages occupied a position similar to that of a common carrier of goods. More recently, that is, in 1910, Congress passed an act by which the Federal Government entered upon and took complete control and exercised complete power over telegraph companies as to their interstate business and contracts. That the transmission of telegrams, where the same are sent over the wires of two or more States, constitutes interstate commerce, can not be questioned, particularly since the very recent decisons of this Court in the cases of *Postal Telegraph Co. v. Warren-Godwin Lumber Co.*, and the *Western Union Telegraph Co. v. Boegli.*

Treating as complete the analogy between common carriers of freight and telegraph companies where both do an interstate business, it would seem to follow as a logical and irresistible conclusion that the decisions of this Honorable Court with respect to what constitutes interstate commerce as applicable to common carriers, would likewise be applicable to the transmission of telegraph messages. In *Hanley v. Kansas City Southern Railway Co.*, 187 U. S., 617, this Court, through Mr. Justice Holmes, rendered an opinion concurred in by all the members of the Court, which has become the

leading case upon the question. In the *Hanley case* the Court, referring to an earlier opinion and citing it with approval, said:

> "To bring the transportation within the control of the State as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

This Court held in the *Hanley case* that a shipment originating in Arkansas destined for another point in the same State, but passing over a route outside the State of Arkansas, constituted interstate commerce.

But, if possible, the very recent decisions of this Court in the two telegraph cases above referred to make the position of this Court clearer still upon the very question involved in the case at bar. In the case of *Postal Telegraph Co. v. Warren-Godwin Lumber Company,* this Court cited with approval a large number of decisions from State Courts with respect to the transmission of telegrams through two or more States and holding that this constitutes interstate commerce. Several of these decisions so cited by this Court refer to telegrams originating in one point and destined to another point in the same State. We deem it necessary here to call attention to only one of these cases cited by this Court, viz., *Western Union Telegraph Co. v. Lee,* 174 Ky., 210. In this Kentucky case the telegram in question was sent from Lebanon, Ky., to Mayfield, Ky., but was transmitted through Louisville and Nashville, the usual route. The Court of Appeals of Kentucky reviewed all the authorities in a carefully considered and elaborate opinion, and among other cases cited with approval *Western Union Telegraph Co. v. Bolling* (Va.), 91 S. E., 154, and *Western Union Telegraph Co. v. Mahone* (Va.), 91 S. E., 157. After citing these and other cases, the Court of Appeals of Kentucky said:

"And, since a telegraph company carrying messages occupies the same relation to commerce as a carrier of goods (*W. U. Tel. Co. v. Texas,* 105 U. S., 460, 26 L. Ed., 1067), it would seem to necessarily follow that the principle announced in the *Hanley case* must be applied here, since the passage of the act of 1910; and that the message sent by Lee constituted interstate commerce. It was so held under precisely similar states of fact in the cases of *Kaufman, Bolling,* and *Mahone,* above cited. Messages sent from one point within a State to another like point, but passing through a portion of another State while in transit, have always been interstate telegrams. But before Congress took control of interstate telegrams State laws could incidentally affect them; since the act of 1910, they can not. The whole subject of interstate telegrams, including the terms of the contract and the character of the recovery, are now controlled by the Federal law; and, as above shown. Lee's telegram was an interstate telegram."

The Court's attention is now especially called to the fact that in the case of *Western Union Telegraph Co. v. Boegli,* decided January 12, 1920, this Court through Mr. Chief Justice White, referring to the cases cited in the former opinion in *Postal Telegraph Co. v. Warren-Godwin Lumber Co.,* says:

"Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert State power after the passage of the act of 1910 were disapproved and various decisions of State Courts of last resort to the contrary, one or more dealing with the subject now in hand, were *approvingly cited.*" (Italics ours.)

It here distinctly appears that the case of *Western Union Telegraph Co. v. Lee* was "approvingly cited" by this Court. It can not be doubted but that this Court carefully considered

that opinion and approved its reasoning and its conclusion, and it would seem hardly necessary to go any further with this argument.

If it be suggested here that the finding of a jury to the effect that the transmission of the message outside of the State was done for the purpose of fraudulently evading the State law, differentiates the case at bar from the case cited, we need only refer to the decision of this Court in the case of *Kirmeyer v. State of Kansas,* 236 N. S., 568, in which this Court, speaking unanimously through Mr. Justice Reynolds, held that a purpose to avoid the consequences of the statutes of a State did not suffice to change the nature of the transaction—that is to say, that the motive which actuates a shipper would not render his business intrastate which would otherwise be interstate commerce. In the *Kirmeyer case* the Supreme Court of Kansas had held that the act of Kirmeyer in shipping the goods in question in the manner in which he did, was a fraud on the jurisdiction of the State, but this view did not prevail with this Court.

The evidence in this case shows that there was absolutely no purpose to evade the State law, fraudulent or otherwise, but conceding that there was, the decision of this Court in the *Kirmeyer case* holds out and out that that would have no bearing upon the decision of the question as to whether the message in question constituted interstate commerce.

However, if we should disregard all of these decisions of this Court, and ask this Court to consider the question in the case at bar *de novo,* the conclusion in favor of the petitioner's contention is equally irresistible.

THE ACT OF CONGRESS OF 1910.

The material part of section 1 of the Act of Congress, approved June 18, 1910, reads as follows:

> "Section 1. The provisions of this act shall apply to . . . telegraph, telephone and cable companies (whether wire or wireless), engaged in sending messages from

> one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning . . . of this act . . ., provided, however, that the provisions of this act shall not . . . apply to the transmission of messages by telephone, telegraph or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

It is apparent from this act that Congress well understood that messages from and to points within the same State were often *transmitted* over wires and through relay stations in other States, and the language of the act is carefully worded so as not to have the effect to make such messages intrastate messages. The act says: "PROVIDED, HOWEVER, THAT THE PROVISIONS OF THIS ACT SHALL NOT . . . APPLY TO THE TRANSMISSION OF MESSAGES WHOLLY WITHIN ONE STATE." Here it is plain that under the Act of Congress, the manner of the transmission of the message controls the question as to whether the message comes within the purview of the Federal statute.

We call attention here to the fact that the Court of Appeals of Kentucky in the case of *Western Union Telegraph Co. v. Lee*, 174 Ky., 210 (192 S. W., 70), already cited, alludes to this significant fact, viz., that the Act of Congress refers to the transmission of messages wholly within one State. The Court says: *"But the statute in the exempting clause speaks of messages 'transmitted' wholly within one State."* (Italics ours).

In this connection also we cite the case of *Berg v. Western Union Telegraph Co.*, 96 S. E., 248, decided by the Supreme Court of South Carolina in June, 1918, in which that Court held that a telegram transmitted from one point in a State through a relay point outside the State to another point in

the State where the message originated, was an interstate message and governed by the Federal law pertaining thereto. The Supreme Court of South Carolina referring to the proviso in the Act of Congress above quoted, says:

> "The words in the proviso to section 1 of the Interstate Commerce Act, 'that the provisions of this act shall not apply to the transportation of passengers or property . . . wholly within one State,' etc., and the words 'nor shall they apply to the *transmission* of messages by telegraph, telephone, or cable, *wholly within one State,*' etc., were intended to declare that the transportation or transmission which was only partly within a State should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities used in the transportation or transmission, located in a particular State, can be subjected to the legislation of that State, but not of any other State. *No other reasonable construction can be placed on that section.*" (Italics ours).

Prior to this Act of Congress, there were cases in which the Courts held that messages from and to points in the same State, transmitted outside the State, did not constitute interstate commerce. Of this character is the opinion quoted from at length by Chief Justice Clark in the case at bar, rendered by the Supreme Court of Virginia in *Telegraph Co. v. Reynolds,* 104 Va., 109, and the later case also of *Telegraph Co. v. Hughes,* 104 Va., 240. The telegrams in both of these cases arose prior to the act of 1910. It will appear presently from the citations below that the Supreme Court of Virginia, since the passage of the act of 1910, has ruled most emphatically that a message transmitted in the manner that the message in the case at bar was sent, is an interstate message and controlled by the Federal law. It is significant also that the Supreme Court of Missouri, as will appear by citations below, now holds with our contention.

The Missouri Court, in *Davis v. Telegraph Co.*, 202 S. W., 292, referring to a former opinion, said:

> "We were in error in deciding *Hewitt v. Telegraph Co.*, 172 Mo. App., 272, 157 S. W., 827, by reason of our failing to note that the decisions we relied upon were made under the law as it was before June 18, 1910, when Congress placed telegraph companies under Federal regulation."

The case of *Western Union Telegraph Co. v. Mahone*, 91 S. E., 157, was decided by the Supreme Court of Virginia in January, 1917. This was cited with approval in the Kentucky case, which this Court approved, as above shown. In this case the message was sent from Norfolk, Va., to Tye River, in the same State, but was relayed through the city of Washington. It developed in the evidence that it was possible to send the message wholly within the State of Virginia, and it is apparent from the opinion of the Court that counsel for the plaintiff relied upon the same course of reasoning upon which is based the opinion of the Court in the case at bar. The Supreme Court of Virginia, however, held that the Court had nothing to do with motives, but only with facts, *i.e.*, only with the question as to whether the message was *actually transmitted through another State*. The Supreme Court of Virginia said:

> "The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives. A local dealer in intoxicating liquors, who lived in the State of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri River, which was connected by a bridge with Leavenworth, Kansas, transacted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the Missouri River

in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The State of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying:

"The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from *Austin v. Tennessee*, 179 U. S., 343, 21 Sup. Ct., 132, 45 L. Ed., 224, and *Cook v. Marshall County*, 196 U. S., 261, 25 Sup. Ct. 233, 49 L. Ed., 471. Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we can not conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State, suffice to change the nature of the transactions." *Kirmeyer v. State of Kansas*, 236 U. S., 568, 36 Sup. Ct., 419, 59 L. Ed., 721.

We refer the Court also to the case of *Western Union Telegraph Co. v. Bowles*, 98 S. E., 645, decided by the Supreme Court of Virginia on March 13, 1919. In that case a message was received at Bassett, Va., destined to Martinsville, Va. The message in question was transmitted from Bassett *through the Martinsville office* (the point of destination) first to Richmond, Va., and from thence it was sent over another direct wire running through two North Carolina offices before getting to Martinsville. The agent at Bassett testified that the message could have been sent direct to Martinsville. The Supreme Court of Virginia, referring to the *Mahone case, supra*, said:

"It was contended in the *Mahone case,* as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this Court held, upon authority, that the interstate character of the message must be tested by the actual facts as to its transmission, and not by the motives of the company; and, further, as necessary corollary from the decision in the *Bolling case,* that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of Federal control."

In the case of *Taylor v. Telegraph Co.,* 204 S. W., 818, the Supreme Court of Missouri had before it the liability of the company upon a telegram sent from Kansas City, Mo., to Triplett, Mo., and the message was relayed through Omaha, Neb. The plaintiff's evidence, however, showed that there was a wire running from Kansas City to Brunswick, Mo., and from Brunswick to Triplett, "that the operator at Brunswick could turn around in his chair and telegraph the message from Brunswick to Triplett, and that a message could also be sent from Kansas City to Chillicothe, Mo., and from thence telegraphed to Triplett." Here, then, it appears that the telegraph company had three ways to send the message—two ways over wires wholly within the State of Missouri, and one over a wire relayed at Omaha, Nebraska. The message was actually sent through Omaha, Neb., and the Court held as a matter of law that the actual transmission of the message through two States constituted interstate commerce. The plaintiff's counsel took the position that the sending of the message through Omaha was to evade the law of the State of Missouri. The Court said:

"Defendant urges that the message was interstate commerce, and therefore not subject to the regulations of this State. Plaintiff urges that it would have been more convenient for defendant to have sent the mes-

sage through Brunswick or Chillicothe to Triplett than through Omaha to Triplett, and at any rate that the sending of the message outside of the State was evidence of an effort to make it interstate commerce, and to thus evade the laws of this State.

"We have carefully examined the record, and we do not find that there was any evidence that it was less convenient or took any greater time to send the message by Omaha than by way of Brunswick or Chillicothe. We do not attempt to say that defendant could avoid the effect of the penalty provided in the statute by purposely sending the message outside of the State in an effort to make it interstate commerce. This case does not present a situation of that kind. The evidence shows that defendant had a choice of two ways of sending the message, one as convenient as the other and requiring as little time as the other, and therefore as direct as the other. There is nothing in the evidence from which a court or jury could say that defendant was attempting to avoid the statute mentioned. We could not go to the extent of holding that where a company has two routes over which a telegram could be sent, one an intrastate and the other an interstate route, each of equal convenience and requiring the same time, and therefore as direct, it must send the message over the intrastate route, and not the interstate route, and that a failure to send it over the former is evidence of an intention to avoid the State statute. Of course, the fact that the origin and destination of the message were in the State of Missouri did not make the message an interstate one, when its course or route took it outside of the State." Citing numerous cases.

In the case of *Kirmeyer v. State of Kansas*, 236 U. S., 568, already referred to, the contention was made that because the shipper in that case could have more easily carried on his transactions wholly within the State of Kansas,

the "mere adoption of cumbersome and expensive methods" of shipment through two States rendered the business intrastate, but this Court repudiated this contention, and referring to the test as to whether the shipment was interstate or intrastate, the Court said:

"That must be tested by the actual transaction."

In addition to decisions of courts of last resort of the several States mentioned above, we would refer the Court to decisions emanating from the States of Oklahoma and Kansas.

In *Western Union Telegraph Co. v. Kaufman*, 162 Pacific, 708, decided by the Supreme Court of Oklahoma, in January, 1917, there will be found a review of all of the decisions, and the Court held in a well considered opinion that a message sent from Apache, Oklahoma, to Henryetta, Oklahoma, but relayed through Wichita, Kansas, constituted interstate commerce.

In the case of *Klippel v. Western Union Telegraph Co.*, decided by the Supreme Court of the State of Kansas within the last few weeks, the Court held that a message sent from Greensburg, Kan., to Hutchinson, Kan., but relayed through Kansas City, Mo., was an interstate message, and the rights of the parties were governed by the Federal statutes and decisions.

It will thus be seen that in every instance where the precise question presented by the case at bar has been before any court of last resort, it has invariably been decided in accordance with the contention of the petitioner, save only in the case now under review and in the later case of *Watson v. Telegraph Co.*, decided quite recently by the Supreme Court of North Carolina.

In consideration, therefore, of the Federal statute above quoted and the decisions of this Court and the State decisions bearing upon the very question at issue here, the following principles seem clearly established:

1. In considering whether a shipment of freight by a

common carrier or the transmission of a telegram by a telegraph company constitutes interstate or intrastate commerce, the test is the "actual transaction"—that is, whether the shipment or the telegram actually passed through two or more States.

2. Where a telegraph company operates wires in two or more adjoining States, and is offered for transmission at one station in a State a message destined for another station in the same State, and the message is actually transmitted over wires running through two States, this constitutes interstate commerce, and the fact that the company had the choice of two routes for transmitting the message and might have transmitted it over wires wholly within one State, does not render the transaction one of intrastate commerce.

3. If in transmitting such a message over wires running through two States, the telegraph company adopts the route which has been the usual and customary route for the transmission of such messages, then by a stronger token the transmission of the message must be considered interstate commerce.

4. The motive of the telegraph company in transmitting the message through two or more States can not have any weight in determining whether the message is an interstate or an intrastate message.

OPINIONS OF NORTH CAROLINA SUPREME COURT.

The members of the Supreme Court of the State of North Carolina are much divided in their opinions on the question here presented, and it may be instructive and it is certainly interesting to note the views of the different members of the Court as disclosed in the record in this case and also in the later case of *Watson v. Telegraph Co.*, 101 S. E., 81.

In the case at bar, the minutes of the Supreme Court, found on the first page of the record from that Court, show that Mr. Justice Brown was not present at the hearing, and did not participate in the decision.

Mr. Chief Justice Clark delivered an opinion in which Mr. Chief Justice Hoke appears to have concurred.

Mr. Justice Allen dissented.

Mr. Justice Walker, the remaining member of the Court, concurred in the result—that is, he concurred in the order of the Court directing judgment to be entered in the Court below in favor of the plaintiff, but he appears not to have concurred in all the reasoning of the Court.

More light is thrown upon the views of the members of the Supreme Court of North Carolina by the opinions in the case of *Watson v. Telegraph Co.*, 101 S. E., 81, decided by that Court on November 19, 1919, being the next day after the petition to rehear the case at bar was denied. In the *Watson case* the message originated at Red Springs, N. C., destined to Greensboro, N. C., but was actually transmitted through the State of South Carolina. The contention was made in that case as in this that the bare fact of transmitting a message through another State when there was an available route wholly within the State of North Carolina, was evidence of an intent on the part of the Telegraph Company to evade the laws of the State of North Carolina, and the jury in the court below so found.

Upon appeal to the Supreme Court, all five of the Justices were sitting. An opinion was rendered by Mr. Chief Justice Clark upholding the judgment rendered against the telegraph company in the Court below, and upholding the finding that the message was sent outside the State to evade the State law.

This opinion appears to have been concurred in by Mr. Justice Hoke.

Mr. Justice Walker filed a concurring opinion in which he distinctly states that he did not concur in all the reasoning of the Court, but he puts his decision upon the ground that the jury found that transmitting the message through the State of South Carolina was to evade the laws of the State of North Carolina. Mr. Justice Walker is of the opinion

that it is necessary to show bad faith, but he holds that the jury is warranted in finding bad faith on the part of the Telegraph Company in transmitting the message through another State provided only it appears that there is a route wholly within the State over which the message could have been transmitted.

Mr. Justice Brown files a sharp dissenting opinion, to which the attention of this Court is particularly called, and this dissenting opinion is concurred in by Mr. Justice Allen. The dissenting Justices hold squarely that where the telegraph company has the choice of two routes, one wholly within the State and one outside the State, if the message is actually transmitted through two States, this constitutes interstate commerce, and that the motive has nothing to do with determining the question.

Coming back to the opinion of Mr. Chief Justice Clark, it will be seen that the Chief Justice himself drew a diagram showing the roundabout way in which the message was actually transmitted through the State of South Carolina, and after referring to the fact that the jury had found adequate testimony that the method used was to evade the State law, the Chief Justice says:

> "But independently of that, under the authority of *Speight v. Telegraph Co.*, 100 S. E., 351, at this term, the Court might well have held that, according to the United States Constitution and geography, as a matter of law, the transmission of a telegram between Red Springs and Greensboro was an intrastate transaction."

From this it will appear that it is the opinion of the Chief Justice of the State, concurred in by Mr. Justice Hoke, that when a case of this character comes before a trial Judge and he is called upon to decide whether the message is an interstate message or an intrastate message, *it only requires a knowledge of the Constitution and of geography to determine the question.* If, geographically speaking, there was a more direct route—that is, a shorter route—wholly within

the State, then the transmission of the message outside the State becomes constitutionally an intrastate message. The deduction is that the Court and jury have nothing to do with relay stations, with the customary method of transmitting such telegrams, nor with the further question as to whether the telegram was transmitted over the quickest route.

In the opinion of the Chief Justice in the case at bar, he alludes more than once to the roundabout and cumbersome method, as he terms it, adopted by the Telegraph Company for transmitting the message. The undisputed evidence shows the establishment of relay stations at Richmond and Norfolk and the necessity for them in order to avoid congestion, but this is wholly ignored in the opinion of the Chief Justice. The primary question seems to be one of distance, and the Court seems to hold that the telegram must be sent by the shortest distance. This view ignores the well known fact that a telegraphic message can be despatched just as quickly over a continuous wire 500 miles as it can over 10 miles, and that the important matter is not a matter of distance,but it is the handling of the message so as to avoid congestion and the adoption of the proper relay stations through which messages can be relayed quickly.

As stated above, the undisputed evidence in this case shows that the message was transmitted in the quickest way that it could have been transmitted, and there was no allegation of any negligent delay in the transmission of the message. If the operator at Greenville had attempted to transmit the message as it is now contended it should have been transmitted, viz., to Weldon, and to have it relayed at Weldon, and this unusual method of transmitting it had caused a delay in the transmission of the message which resulted in damage to the plaintiff, can it be doubted that the plaintiff could have recovered against the defendant for negligent delay in the transmission of the message by showing that if the message had been transmitted in the usual and ordinary

way through the relay points at Richmond and Norfolk, it would have reached its destination very much more quickly?

RULINGS OF THE SUPREME COURT UNSUPPORTED BY EVIDENCE.

From the position taken by us, it is apparent that under our view of the case, most of the evidence in this case was wholly irrelevant and immaterial in determining the question as to whether this was an intrastate or an interstate message. If, however, this Court should in any aspect of the case hold that the evidence is material or relevant, then it becomes the duty of this Court to examine into the evidence. This Court has previously decided that where a Federal right is brought in question, and it is contended that this Federal right is supported by the undisputed evidence in the case, it then becomes the duty of the Court to examine into the evidence.

> Creswell v. Grand Lodge Knights of Pythias, 225 U. S., 246.
> North Carolina Ry. Co. v. Zachery, 232 U. S., 248.
> Kinzell v. C. M. & St. P. Ry. Co., decided May 19, 1919; U. S. Adv. Ops., 1918-19, p. 477.
> Philadelphia B. & W. Ry. Co. v. Smith, decided May 19, 1919; U. S. Adv. Ops., 1918-19, p. 497.

In the first part of the opinion of Chief Justice Clark in reciting the facts and referring to the points of origin and destination, he says:

> "Both these points are in this State and the defendant has a continuous line in this State and in operation from Greenville to Rosemary."

We respectfully submit that this statement is entirely unsupported by the testimony. It is true that the plaintiffs' witness, Williamson, on his direct examination, did say that the most direct way to transmit the message would have been

from Greenville through Weldon to Roanoke Rapids, but he fully explained this upon his cross-examination in which he distinctly states that the Greenville operator could not get the Weldon operator without first calling the Richmond operator and asking the Richmond operator to tell the Weldon operator to "cut in" on the Greenville wire. This witness made the same statement as to the way in which the Greenville operator would have gotten the wire going to Roanoke Rapids —that is, it would have been necessary for him to "cut in" on the wire from Norfolk to Roanoke Rapids. The witnesses for the defendant all testified that there was no direct wire from Greenville to Roanoke Rapids.

While in the first part of the opinion of the Chief Justice, which appears in the record, it is stated that in view of the fact that the Court deemed as a matter of law that this was an intrastate message, it was immaterial whether the message was sent outside the State "in order to evade the North Carolina laws applicable to the transmission of messages of this nature in intrastate commerce." Yet in the latter part of the opinion the Chief Justice says:

> "There was error in setting aside the verdict. If the first issue had been material, there was evidence to sustain the finding of the jury."

In the body of the opinion the Chief Justice, in referring to the difficulty of proving the bad faith of the petitioner in sending the message out of the State, says:

> "For it would be almost impossible to prove that this was done to evade the State jurisdiction since no one but the defendant and its agents can know its motive."

Notwithstanding that it would be "almost impossible" to make proof of this fraudulent motive, the Court nevertheless holds that the "almost impossible" was accomplished in this

case, and that this evidence does show the fraudulent motive of the petitioner in transmitting the message outside the State!

Your petitioner has already shown the Court that the route over which the message was sent was the one that had been in use for more than ten years, and that it was the quickest route by which a message could be sent between Greenville and Rosemary. Reduced, then, to its last analysis, it is found that the Supreme Court of North Carolina upholds the findings of the jury that this method of transmitting the message in question was used in this case for a fraudulent purpose, although the message was sent in the usual and customary way which had obtained for more than ten years, and, above all, was the quickest way in which the message could be despatched.

If this ruling is correct, it will be permissible for the jury in any other case where the evidence is similar to this, to make a similar finding as to fraud and in this way to put the stigma of fraud upon your petitioner and its officers and agents in all such cases. The net result of such a decision would be to compel the telegraph company to send messages on wires wholly within the State, although sending the messages in this way would cause great delays and, therefore, necessarily limit and restrict the use of the telegraph company for transmitting messages.

That part of the opinion of the Supreme Court of North Carolina which holds that there was evidence in this case sufficient to warrant the jury in finding that there was a fraudulent evasion of the State law, becomes all the more remarkable when it is considered that by the undisputed evidence this same route for sending messages through Virginia had been adopted and used more than ten years before the sending of this telegram—that is, long prior to the Act of Congress that brought about the change in the law and prior to the decision of the Supreme Court of North Carolina in the case of *Meadows v. Telegraph Co.*, 173 N. C., 240, de-

cided in April, 1917, which was the first case in North Carolina holding that damages could not be recovered for negligence in connection with an interstate message.

In the opinion of Chief Justice Clark he relies upon *Railroad Co. v. Pennsylvania*, 145 U. S., 192; *Commissioners v. Telegraph Co.*, 113 N. C., 122; *Seawell v. R. R. Co.*, 110 Mo., 292; *Campbell v. R. R.*, 86 Ia., 587. Every one of these cases has been distinguished, discredited, or overruled by the opinion of this Honorable Court in *Hanley v. Railroad Co.*, 187 U. S., 617, and what is more remarkable the Supreme Court of North Carolina in the case of *Shelby Ice & Fuel Co. v. R. R. Co.*, 147 N. C., 66, refers to the fact that all four of these cases had been distinguished, discredited or overruled by the Supreme Court of the United States. Likewise, in the case of *Bateman v. Telegraph Co.*, 174 N. C., 97, the Supreme Court of North Carolina again refers to the fact that the above mentioned cases were no longer authority upon questions of interstate commerce.

CONCLUSION.

In conclusion, we submit that the importance of this case cannot be too much magnified, at least so far as the State of North Carolina is concerned, when this Court realizes the scope of the decision of the Supreme Court of North Carolina in the case at bar, and particularly as elaborated in the case of *Watson v. Telegraph Co.*, above referred to. It will be seen that the Supreme Court of North Carolina recognizes that the same law applies to the shipment of freight that does to the transmission of telegrams, and that in either case it is within the province of the Court in determining whether a shipment or a telegram is intrastate or interstate commerce, to inquire into the routes over which the shipment might have been made or the telegram may have been transmitted, and to inquire also into the motives which actuated making the shipment in the particular manner in which the shipment was made, and thus the rights of litigants will be made to de-

pend upon questions which Congress never contemplated should enter into the determination of what constitutes interstate commerce.

It is earnestly submitted that it is of great importance that this Honorable Court direct that this case be heard and that the Court "run and mark the lines" dividing intrastate commerce and interstate commerce, and thus settle the conflict that exists at least between the decisions of the Supreme Court of North Carolina and the decisions of many other Courts of last resort in other states.

Respectfully submitted,

FRANCIS R. STARK,
WALTER E. DANIEL,
CHARLES W. TILLETT,
THOMAS C. GUTHRIE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
MAY 3 1920
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted] 241

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

ADDIE SPEIGHT.

MOTION TO PLACE ON THE SUMMARY DOCKET.

FRANCIS R. STARK,
CHARLES W. TILLETT,
Counsel for Petitioner.

(27,467)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 712.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

ADDIE SPEIGHT, RESPONDENT.

To Addie Speight and to Her Counsel:

You will take notice that on Monday, May 17, 1920, counsel for petitioner will present to the Supreme Court of the United States in the City of Washington a motion, copy of which is hereto annexed.

This April 26, 1920.

WESTERN UNION TELEGRAPH COMPANY,
By CHARLES W. TILLETT,
Counsel for Petitioner.

Service of foregoing notice together with copy of motion attached is acknowledged, this the 26th day of April, 1920.

ADDIE SPEIGHT,
By MURRAY ALLEN,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 712.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

ADDIE SPEIGHT, RESPONDENT.

MOTION TO PLACE ON THE SUMMARY DOCKET.

Comes now the Western Union Telegraph Company, petitioner, and moves this honorable court that this cause be transferred for hearing to the summary docket, for the following reasons:

1. In this cause the petitioner presented to this court on March 1, 1920, a petition for a writ of certiorari to the Supreme Court of North Carolina, and on the following Monday, March 8th, 1920, this honorable court allowed the petition, and the cause is now before the court for a hearing.

2. In this cause the Supreme Court of North Carolina held the plaintiff entitled to recover $100.00 damages for mental anguish alleged to have been suffered by her on account of her failure to attend the funeral of her brother, she averring that her failure to attend the funeral was caused by the negligence of the Telegraph Company in misdating the telegram which was made the basis of the action; it was shown by all the evidence that the telegram originated at one point in North Carolina, destined to another point in North Carolina,

but that the message was relayed through the city of Richmond, in the State of Virginia, and that that had been the customary route for transmitting messages between these points for more than ten years.

The point involved in the case is as to whether the message is an interstate message or an intrastate message, there being no dispute but that if the court holds the message in question to be an interstate message the judgment of the Supreme Court of North Carolina should be reversed.

3. This is not a cause which will require any extended argument for that it is submitted that this honorable court has in effect decided the point involved in this case in the two recent cases before this court, viz., Postal Telegraph Co. *vs.* Warren-Godwin Lumber Company and the case of Western Union Telegraph Company *vs.* Boegli, decided January 12, 1920. In the Boegli case the Chief Justice referred to cases cited in the former opinion and said that certain cases from the State courts were *"approvingly cited."* Among these cases "approvingly cited" are several cases that involve the identical point involved in this case, among them being Western Union Telegraph Company *vs.* Lee, 174 Ky., 210. Numerous other decisions are cited in the brief presented when the petition for certiorari was filed, and to which the court is respectfully referred.

4. The petitioner shows to the court that as a consequence, following the decision of the Supreme Court of North Carolina in the above-entitled cause and the decision of the same purport in the case of Watson *vs.* Telegraph Company, later decided by the Supreme Court of North Carolina (copy of which opinion is filed with the record in this case), numerous suits have been brought against petitioner upon messages originating in the State of North Carolina, destined to points in the same State but transmitted through relay stations outside of the State, and the judges hearing these causes are following the decision of the Supreme Court of North Caro-

lina in the cases above referred to and are holding that such messages are intrastate messages, and the plaintiffs are being allowed to recover damages for mental anguish and other damages in violation of the rule laid down for recovery in respect to interstate messages. The petitioner will be compelled to bring all of these cases by petitions for certiorari addressed to this court in order to avoid paying the unjust and unreasonable judgments for mental anguish that are being rendered against the petitioner, and in this way it will be necessary to vex this honorable court with frequent petitions for certiorari in cases of this identical kind.

If this honorable court will place this cause upon the summary docket for hearing, the petitioner submits with confidence that this court will reverse the Supreme Court of North Carolina, and will thus put an end to all suits of this character.

5. The petitioner further shows the court that there are suits pending in other States of the Union besides North Carolina, and these courts are being urged upon the authority of the case at bar to hold that messages of this character are intrastate messages and not interstate messages, and the courts are being urged to award damages for mental anguish in such cases in accordance with the rules prevailing in such States with respect to intrastate messages.

FRANCIS R. STARK,
CHARLES W. TILLETT,
Counsel for Western Union Telegraph Company, Petitioner.

[Endorsed:] File No. 27,467. Supreme Court U. S. October Term, 1919. Term No. 712. Western Union Telegraph Co., petitioner, *vs.* Addie Speight. Motion to place on summary docket, notice, and proof of service. Filed May 3, 1920.

Office Supreme Court, U. S.
FILED
SEP 20 1920
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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 241.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

ADDIE SPEIGHT.

PETITIONER'S BRIEF.

RUSH TAGGART,
FRANCIS R. STARK,
WALTER E. DANIEL,
CHARLES W. TILLETT,
THOMAS C. GUTHRIE,
Counsel for Petitioner.

(27,467)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 241.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

ADDIE SPEIGHT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

PETITIONER'S BRIEF.

Nature of the Case.

This is an action originally brought in the Superior Court of Halifax County, North Carolina, by Addie Speight, the plaintiff therein, to recover of the Western Union Telegraph Company, defendant therein, damages for mental anguish alleged to have been sustained by the plaintiff, arising out of her failure to attend the funeral of her brother. The plain-

tiff alleged that her failure to attend the funeral was caused by the negligence of the telegraph company in changing the date of the telegram sent to her announcing the death of her brother, John Smith, and giving the date of his funeral. The change in the date of the telegram made it appear that the funeral took place on the day the telegram was received instead of on the following day, as appeared in the original message.

The jury rendered a verdict on all of the issues in favor of the plaintiff, and awarded the plaintiff one hundred dollars ($100) damages for the mental anguish suffered by her. The trial court set aside the verdict as a matter of law and not as a matter of discretion, and entered a judgment of involuntary nonsuit against the plaintiff. The plaintiff appealed to the Supreme Court of North Carolina, and that court held that the trial court had erred in setting aside the verdict and that the verdict should be allowed to stand as rendered by the jury. The Supreme Court thereupon issued its mandate to the lower court to enter judgment for the plaintiff upon the verdict rendered. In the opinion rendered by the Supreme Court of North Carolina, which appears in the record (p. 66), the Supreme Court disposed of all of the questions involved in the case and left nothing for the lower court to do except to enter judgment upon the verdict according to its mandate.

Main Point Involved in the Case.

The main point in the case is whether the telegraphic message in question is to be considered as an intrastate message so as to render the telegraph company liable to the plaintiff for damages arising out of mental anguish, or whether the message is to be considered as an interstate message; that is, whether it constitutes interstate commerce. If it is held to be an interstate message, then it is admitted that the plaintiff is not entitled to recover damages for mental anguish, which is the sole damage claimed, and it is also

admitted that the action should be dismissed. The message was sent from Greenville, North Carolina, addressed to the plaintiff at Rosemary, North Carolina. It appeared in the case that Roanoke Rapids was the delivery point for telegrams destined for Rosemary, there being no telegraph office at Rosemary.

It is set up in the answer of the defendant, and it is admitted in the replication of the plaintiff, that the message in question was actually transmitted from Greenville, North Carolina, through Richmond, Virginia, and Norfolk, Virginia, to Roanoke Rapids; that is, it is admitted that interstate commerce was utilized in the actual transmission of the message.

The undisputed evidence showed that the route used in the transmission of the message—that is, through Richmond and Norfolk, Virginia, relay stations—was the route which had been actually used in the transmission of like messages for more than ten years.

The undisputed evidence showed that there was no direct and continuous wire from Greenville, North Carolina, to Roanoke Rapids, the telegraph station for Rosemary.

There was no allegation or proof that there was any delay in the delivery of the message, and all of the evidence showed that the route over which the message was actually sent was the quickest way to send the message from Greenville to Roanoke Rapids.

In other words, the question presented to the court in this case, concisely stated, is this:

Where a telegraphic message originating at one point in a State, destined to another point in the same State, is actually transmitted over the route which is usual and customary in the transmission of messages between these two points, and this causes the message to be transmitted over wires and through relay points in another State, is such a message thus transmitted an interstate message; that is, does it constitute interstate commerce?

Pleadings in the Cause.

The complaint filed in the Superior Court of Halifax County alleged that the following telegram was delivered to the telegraph company for transmission, at Greenville, North Carolina:

1-24-18.

Mrs. Addie Speight,
Rosemary, N. C.:

Father died this morning. Funeral tomorrow, 10:10 A. M. APPIE O. SMITH.

The plaintiff further alleged that when the message was delivered to her the date was changed to the 23d, and that inasmuch as she received the message on the 24th it was thus made to appear that the funeral took place the same day she received the message, and in this way she was misled and prevented from attending the funeral of the deceased, who was her brother. The plaintiff further alleged that had the date of the telegram not been changed she would have attended her brother's funeral, and that by reason of her failure to attend the funeral, "the plaintiff has suffered great mental pain and anguish, and has been endamaged in a large amount, to wit: in the sum of three thousand dollars."

The defendant filed an answer, which *inter alia* set up the fact that the usual and customary route for the transmission of messages from Greenville to Roanoke Rapids (Roanoke Rapids being the delivery point for telegrams to Rosemary) was from Greenville to Richmond, Virginia, the regular relay point, and thence to Norfolk, Virginia, another relay point, and from Norfolk to Roanoke Rapids.

Defendant further alleged that the message in question was an *unrepeated message,* and was sent subject to the usual conditions and stipulations, referring particularly to the stipulation that there could be no recovery for mistakes or

delays in the transmission of an unrepeated message beyond the amount received for sending the same, nor for mistakes or delays in the transmission of a repeated message beyond fifty times the sum received for the same, unless a special contract was made, and that in no event could there be a recovery of more than fifty dollars.

The defendant further set up the act of Congress, approved June 18, 1910, by which Congress entered upon and assumed charge of the regulation of the field of interstate communication by telegraph, and the defendant alleged that the message in question was an interstate message, and that the rights of the parties were to be determined by the decisions holding that there could be no recovery for mental anguish arising out of a failure to transmit and deliver an interstate message.

The plaintiff filed a replication, in which the plaintiff admitted that the message was actually sent first to Richmond, thence to Norfolk, and thence to Roanoke Rapids, but alleged that "This route was selected by the defendant to impress upon the message an interstate character, and was sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading the law of the State of North Carolina and to acquire the protection of the Federal law set out in the answer as a defense to this action, thereby attempting to evade liability for its negligence; that the most convenient, easy, direct, and prompt route for a message from Greenville, North Carolina, to Roanoke Rapids, North Carolina, is direct from Greenville to Weldon, thence to Roanoke Rapids; that the telegraph wire which the defendant used to transmit the message to Richmond passed through the Weldon office on its way to Richmond, and again on its way to Roanoke Rapids from Norfolk."

The plaintiff further alleged that the stipulations under which the message was sent were unreasonable and void.

Proceedings in Trial Court.

At the hearing of the case in the trial court the following issues were submitted to the jury and answered as follows:

1. Was the message sued on sent out of the State of North Carolina into the State of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?
Answer: "Yes."
2. Was the message negligently changed in transmission by the defendant?
Answer: "Yes."
3. What damage, if any, is the plaintiff entitled to recover?
Answer: "$100.00."

The counsel for the telegraph company, during the progress of the trial and in apt time, moved for a judgment of nonsuit, which the court at that time overruled, and the defendant's counsel also moved that the jury be instructed to answer the first issue, "No" and the third issue, "Nothing." Counsel further requested the court to charge the jury that inasmuch as this was an unrepeated message in no event was the plaintiff entitled to recover more than the charge for sending the same, forty cents.

The court submitted all the issues to the jury under a charge which is fully set out in the record (p. 18).

After the rendition of the verdict, defendant's counsel moved to set the verdict aside, and moved for a judgment of nonsuit, basing the motion upon the ground mainly that the message in question constituted interstate commerce, and that the plaintiff was not entitled to recover any damages whatever for the mental anguish alleged to have been suffered by her on account of the negligence of the defendant, and further, that there was no evidence to support the finding of the jury on the first issue.

His honor, the presiding judge, granted the motion and rendered a judgment which concluded as follows:

> "And the jury having responded to the first issue 'Yes,' to the second issue 'Yes,' and to the third issue '$100.00,' and the court being of the opinion that as a matter of law in no view of the testimony is the plaintiff entitled to recover;
>
> "Now, on motion of W. E. Daniel, attorney for the defendant, it is ordered, adjudged, and decreed that the verdict herein be and the same is set aside as a matter of law, that the plaintiff be and she is hereby nonsuited, and that the defendant go without day."

Thereupon both the plaintiff and the defendant appealed to the Supreme Court of North Carolina, and that court filed an opinion reversing the lower court, and completely disposing of all the points involved in the case. The Supreme Court directed that the judge of the Superior Court of Halifax County enter judgment for the plaintiff upon the verdict as rendered by the jury.

Evidence Supporting Petitioner's Contention.

The contention of the petitioner is that upon the admission in the pleadings to the effect that the message in question was actually transmitted through the States of North Carolina and Virginia, the North Carolina Supreme Court should have held, and this court is asked to hold, that the transmission of the message through these two States constituted interstate commerce, and that the question as to whether it was *possible* to have transmitted the message over wires wholly within the State of North Carolina, and also the question as to the *motive* which actuated the petitioner in transmitting the message through Virginia, have no bearing upon the case.

However, as this court might hold that the pleadings are not conclusive of the questions, and that recourse must be had

to the evidence in the case to determine whether the message was an intrastate or an interstate message, we invite the court's attention to the undisputed evidence bearing on this phase of the case.

We shall not discuss any phase of the evidence which is in dispute; but we shall concede that this court is bound by all findings of fact in the court below, where such findings are supported by evidence which warranted the court or the jury in making such findings.

On the other hand, this court held, in the case of Creswell *vs.* Grand Lodge Knights of Pythias, 225 U. S., 246, and in other cases cited in the brief, that wherever it is claimed that a Federal right has been denied as a result of the findings of fact, and it is contended that there was no evidence in the case to support the findings, it then becomes the duty of the court to examine the record in the case to ascertain whether there was any evidence to support the findings of fact. Conceding, then, for the sake of the argument, and for that purpose only, that the facts stated below are material, we now show the court that by the admissions and the undisputed evidence these facts are established:

(1) That the message in question was actually transmitted from Greenville, N. C., through Richmond, Va., and Norfolk, Va., to Roanoke Rapids, the telegraph station for Rosemary.

(2) That the route over which the message was sent was the usual and customary route for the transmission of messages between these points and was the route which had been used for many years.

(3) The route over which the message was transmitted was the quickest way in which it was possible for the telegraph company to have transmitted and delivered the message.

(4) That there was no direct and continuous wire over which the message could have been transmitted wholly within the State of North Carolina; that in any event it would have been necessary to have relayed the message at Weldon, which was not a relay station, and the relaying of the message at Weldon would have retarded the transmission and delivery of the message.

(5) That there was no evidence to support the finding of the jury that the message was sent through Virginia for the purpose of fraudulently evading the State law.

Evidence Briefly Analyzed.

As bearing upon these questions of fact it will be observed that there were but three witnesses, one for the plaintiff, C. E. Williamson, and two for the defendant, E. M. Kilpatrick and J. L. Bundy. The plaintiff's witness, C. E. Williamson (Rec., p. 12), stated that he had been a telegraph operator since 1909. He testified (p. 13):

> "It is not practicable for Greenville to work with every office in North Carolina. It works with Richmond. That is the relay point. They send to Richmond; Richmond sends Weldon's business back to Weldon. That has been the custom ever since I have known anything about it. They would get to Roanoke Rapids by sending to Richmond, Richmond to Norfolk, Norfolk to Roanoke Rapids. * * * The way by Richmond would be the quickest way; that is, with the wires arranged as they are now, and they have been arranged that way ever since I have been an operator. * * * Norfolk is the relay point for Roanoke Rapids. This has been the custom ever since Roanoke Rapids was established as an independent office."

It is true that this witness Williamson first testified that the most "direct route" from Greenville to Rosemary would

be Greenville to Weldon and Weldon to Roanoke Rapids, but on cross-examination he distinctly explained that while this would be the most direct route in the sense that it was the nearest way, yet it was not the quickest route and was not the customary route. He testified, as shown by the above extracts from his testimony, that the quickest way was to send the message exactly as it was sent.

The witness Williamson further explained that it would have been *impossible* for the operator at Greenville to have called the office at Weldon, because, although the wire from Greenville to Richmond ran through the Weldon office, it was not connected with any switchboard at Weldon, and that the only way the Greenville operator could have gotten into direct communication with the Weldon operator was first to call the Richmond operator and have him ask the Weldon operator to "cut in" on the Greenville wire.

The defendant's witness Kilpatrick (p. 54) testified that he was the chief operator of the Western Union at Norfolk, Virginia, and had been connected with the company for fifteen years. He testified:

> "There are two direct routes from Greenville through Richmond to Norfolk to Roanoke Rapids. It has to come through Norfolk in either case. It can be sent from Greenville to Richmond or Greenville to Norfolk. It is not possible under the system adopted by the Western Union Telegraph Company for a message between those points to go other than through Norfolk."

Defendant's witness Bundy testified (p. 55) that he had been with the Western Union for seven years, and that he was the operator at Richmond who received the message in question. He testified:

> "Roanoke Rapids has to work with Norfolk. Greenville to get the message through in the promptest way would send to Richmond, Richmond to Norfolk, and Norfolk to Roanoke Rapids. Greenville

> can work with Norfolk on the Norfolk-Kinston wire, but this would not be the quickest and most convenient route. The quickest way to get a message through is by way of Richmond to Norfolk, Norfolk to Roanoke Rapids. Norfolk is the outlet for messages sent to Roanoke Rapids. * * * It is impossible to send direct from Greenville to Roanoke Rapids. Greenville has no Roanoke Rapids wire."

The foregoing extracts from the testimony of witnesses conclusively show that each of the statements of fact made above is conclusively established by the undisputed evidence.

Fundamental Facts to be Considered.

Preliminary to our effort to point out specifically the errors complained of we wish to call the attention of the court to some fundamental facts connected with operating the business of a telegraph company.

It will doubtless be conceded that it is the duty of a telegraph company engaged in the transmission of messages to deliver messages as quickly as is reasonably possible and with as much economy as is reasonably possible.

If there is a direct connection between two points a message can be sent as quickly over a long distance as over a short distance. If there is a direct wire from Raleigh to New York a message can be transmitted as quickly from Raleigh to New York, 500 miles, as it can from Raleigh to Cary, 10 miles.

It is a practical impossibility for the telegraph company to have direct wires connecting all points within the State of North Carolina. If the company should undertake to construct direct wires so that there might be direct communication between all points within the State, without having any messages relayed, it would necessitate the construction of innumerable wires, at an enormous cost, and this extra cost would, of course, increase the rates which the company would

be entitled to charge for the transmission and delivery of messages.

Relay Stations Necessary.

This makes it a practical necessity for the company to establish what are known as relay stations. Into these relay stations run many wires, connecting a large number of telegraph stations directly with the relay station. A great many operators are employed at these relay stations, and facilities are there afforded to have a message that comes into the relay station upon one wire and received by one operator transferred quickly in the relay station over to another operator, to be sent over another wire to its destination (Rec., p. 74).

It is also true that the company is under the practical necessity of having quite a large number of relay stations, and quite frequently a message must be transmitted through two or more relay stations before it reaches its destination.

As it is impossible to have direct connection between all points the desideratum is to transmit a message to the relay station where there are operators who can quickly transfer the message to another wire and thus speed it forward.

The establishment of these relay stations is a matter that requires the utmost skill of the highest experts of the company. It is not, as the Supreme Court of North Carolina assumed in its opinion, a mere matter of convenience for the company, but these experts are compelled to take into consideration the location of all the stations and wires of the company in certain territory, the volume of business at each station, and then map out the whole territory and fix the points at which the relay stations shall be established, so as to enable the company to handle messages with the greatest despatch and economy.

These plans and maps are made in the first instance by the experts for a given area, but must of necessity be transmitted to the general office in New York, where they are gone over by the foremost experts which the company can employ. In

the head office in New York there are large revolving maps covering the whole territory in which the company does business, and a large force of expert employees are going over these maps every day and making changes such as are deemed necessary or proper from time to time (Rec., p. 75).

The court will thus see the absolute necessity for the establishment of these relay stations, and the court will also see that it is not a mere matter of whim or convenience, but is a matter that requires the most careful and painstaking planning and mapping.

It will appear from this that although a wire may pass through a certain office, and although it may be possible at such office to "cut in" on this wire, yet if the station in question is not a relay office it is not feasible to have messages taken off such wires at such stations. In many instances the wires run through a large number of stations solely for testing purposes; that is, to enable the company in case of trouble on the wires to locate as quickly as possible where the trouble is.

This method of doing business obtains not only with telegraph companies doing a commercial business over the wires, but also with railroad companies that do no commercial business over the railroad wires, but do railroad business exclusively.

For example: The Southern Railway, at this time, in sending railroad messages over the railroad wires from Washington to Charlotte, N. C., first sends these messages over a wire that runs through the Charlotte office, down to Atlanta, Georgia, and the message is then sent back to Charlotte. It is possible to cut in on this wire at Charlotte and take a message off without sending it to Atlanta, but the Southern Railway finds that there is not enough business between Washington and Charlotte to require the services of an operator at Charlotte, but there is enough business between the Atlanta office and the Charlotte office to require a special operator in Atlanta to take charge of the Charlotte wire.

The railway company, therefore, established Atlanta as a relay point for messages to Charlotte, and, as stated above, transmits the messages over a wire running through the Charlotte office to Atlanta and then back to Charlotte.

Weldon Not a Relay Point.

The contention of the plaintiff in the case is that the message should have been sent from Greenville to Weldon and from Weldon to Roanoke Rapids, all within the State of North Carolina.

The petitioner makes several answers to this contention.

In the first place, the testimony of all the witnesses shows that conceding that it was *possible* to have transmitted the message from Greenville to Weldon and from Weldon to Roanoke Rapids, this was not the usual and customary method. The usual and customary method which had obtained for ten years or more appears by all the testimony to have been the route that was actually used, viz., from Greenville to Richmond, Richmond to Norfolk, Norfolk to Roanoke Rapids.

But it appears from the testimony of the plaintiff's own witness Williamson that it would have been impossible for the Greenville operator to have called the Weldon office in the first instance. Williamson testified (Rec., p. 36): "If Greenville wanted Weldon, she would get Richmond to tell Weldon to answer Greenville. They would have to call Richmond first, and ask Richmond to call Weldon, and to tell Weldon to answer the Greenville call." It appears from this uncontradicted testimony that an interstate agency, to wit, the operator at Richmond, would necessarily have been invoked and used in the operation of transmitting the message, even though the actual message itself had never been sent out of the State.

The plaintiff's witness Williamson as well as the defendant's witnesses testified that the quickest way to send the

message was the way in which it was sent. The main purpose of transmitting messages by means of telegrams instead of through the mails is to send the messages by the quickest route. And it is respectfully submitted that it would be a curious law that would require a telegraph company to transmit a message by the slowest route solely for the purpose of keeping the message at all times within the State in which it originated.

Some stress is laid by the plaintiff's counsel upon the fact that the wires that ran from Greenville to Richmond and also the wires from Norfolk to Roanoke Rapids both passed through the Weldon office. The attention of the court, however, is called to the fact that the defendant's witness Kilpatrick, whose testimony is uncontradicted, explained that these wires ran through the Weldon office solely for testing purposes (p. 54): "The wire from Norfolk to Roanoke Rapids goes through the Weldon office but for test purposes only; it is not operated at Weldon."

Also defendant's witness Bundy testified (Rec., p. 55):

> "The wires coming in Weldon instead of being on poles are brought into the Weldon office in a loop, and this loop runs through the switchboard. This is done for test purposes. In case of storms or trouble, you can tell where the trouble is by testing. Sometimes the wires are broken and you can patch a bad wire on a good one. The operator at Weldon has a plug that he can take and plug and cut in on any wire he wishes to, but ordinarily he would not do this unless he was told to cut in and listen. There are a good many of these wires strapped to the switchboard in Weldon, as I said, for test purposes, and have no instrument attached to them. The only way you can hear what is passing on them would be for the operator to cut in with his plug."

The plaintiff's witness Williamson testified (p. 36):

> "Weldon is the relay point for Kinston branch, to Oak City and Tillery, but not for Greenville. Wire

> No. 111 runs from Weldon to Greenville. All of them run through the Weldon office for test purposes. If there should be trouble with the Weldon wire, it could cut in on another from a great many places in such a way as systematically to distribute them and avoid congestion."

And later on the same witness testified (p. 37):

> "Norfolk is the relay point for Roanoke Rapids. This has been the custom ever since Roanoke Rapids was established as an independent office."

It is, therefore, confidently submitted that the undisputed evidence shows that Weldon was not the relay point for messages to Roanoke Rapids, but that Norfolk, Virginia, was.

No Continuous Line from Greenville to Roanoke Rapids.

In the opinion rendered in this case by Chief Justice Clark, referring to the transmission of the message from Greenville to Rosemary, he says: "Both these points are in this State, and the defendant has a continuous line entirely in this State and in operation from Greenville to Rosemary."

From this statement of the chief justice it would seem to appear that the operator at Greenville could have called the operator at Roanoke Rapids (that being the telegraph station for Rosemary), and could have sent the message direct over a continuous wire from Greenville to Roanoke Rapids, or Rosemary.

An examination of the evidence will disclose the fact that the chief justice is wholly in error in making this statement, as all of the evidence shows that there was no such continuous wire.

The plaintiff's witness Williamson testified (Rec., p. 36):

> "If Greenville wanted Weldon, she would get Richmond to tell Weldon to answer Greenville. They would have to call Richmond first and ask Richmond to call Weldon and tell Weldon to answer the Green-

> ville call. This has been the custom ever since I commenced to work. It is not practical for Greenville to work with every office in North Carolina. It works with Richmond. That is the relay point. They send to Richmond, Richmond sends Weldon's business back to Weldon. Greenville sends to Richmond, and Richmond sends to Weldon. This has been the custom ever since I have known anything about it."

Here the witness Williamson makes it perfectly plain that in order for the Greenville operator to get the operator at Weldon, it was necessary for Greenville first to call Richmond and have Richmond to call the Weldon operator and tell the Weldon operator to cut in on the Greenville wire.

The plaintiff's witness Williamson also testified (Rec., p. 37) as follows:

> "The reason for the present method of transmitting messages via Richmond and Norfolk and back to Roanoke Rapids is because of the present arrangement of the wires. The Weldon office can cut in on wire No. 111 and any other wire that passes through Weldon. There is a wire from Weldon to Roanoke Rapids. Weldon can work direct with the Roanoke Rapids office. The wire runs from Norfolk to Roanoke Rapids and has to come through the same switchboard, and you can cut in on the wire. Unless this is done, Weldon would not know that Weldon is being called. They could ask Norfolk to call and tell Weldon to cut in."

Here again it is apparent that while the witness states there was a wire running from Weldon to Roanoke Rapids, he is referring to the same wire that runs from Norfolk to Roanoke Rapids, and the witness Williamson states that the operator at Weldon could not use this wire except by *cutting in* on it in the way he described.

It is thus shown conclusively from the testimony of the plaintiff's witness Williamson that there was no continuous

wire running from Greenville to Roanoke Rapids, but that the message, if sent wholly within the State of North Carolina, must necessarily have been relayed at Weldon in the very unusual and unsatisfactory manner described by the witness Williamson.

Turning to the testimony of the defendant's witness Kilpatrick upon this point (Rec., p. 54), this witness testified:

> "There are two direct routes from, through Richmond to Norfolk to Roanoke Rapids, or from Greenville to Norfolk to Roanoke Rapids. It has to come through Norfolk in either case. It can be sent from Greenville to Richmond or from Greenville to Norfolk. It is not possible under the system adopted by the Western Union Telegraph Company for a message between these points to go other than through Norfolk."

Again this witness testified (p. 54):

> "The wire from Norfolk to Roanoke Rapids goes through the Weldon office, but for test purposes only. It is not operated at Weldon."

The defendant's witness J. L. Bundy testified (p. 55):

> "It is impossible to send direct from Greenville to Roanoke Rapids. Greenville has no Roanoke Rapids wire."

It appears, therefore, conclusively that the chief justice was in error in stating that the evidence shows that the message in question could have been sent over a continuous wire from Greenville to Rosemary or Roanoke Rapids.

No Evidence of Fraudulent Evasion of State Law.

While in the first part of the opinion of the chief justice, which appears in the record (p. 66), it is stated that in view of the fact that the court deemed as a matter of law that this

was an intrastate message, it was immaterial whether the message was sent outside the State "in order to evade the North Carolina laws applicable to the transmission of messages of this nature in intrastate commerce," yet in the latter part of the opinion the chief justice said: "There was error in setting aside the verdict; if the first issue had been material, there was evidence to sustain the finding of the jury."

This ruling of the court to the effect that the evidence in this case warrants a jury in finding that the transmission of a message in the manner and under the circumstances surrounding the transmission of this message was a fraudulent evasion of the State law, makes this case of very great importance to the petitioner provided the court should hold that the *motive* of the petitioner in transmitting the message through the State of Virginia would have any bearing in determining whether the transmission of the message constituted interstate commerce. We cite in the brief below opinions of this court holding that the *motive* of a person or company in using interstate agencies cannot convert interstate commerce into intrastate commerce.

However, treating as of importance the finding of the jury to the effect that the message was transmitted through Virginia for the purpose of fraudulently evading the laws of North Carolina, it is confidently submitted that there is not a line of testimony that shows any intent, fraudulent or otherwise, on the part of the petitioner to evade the State laws. Indeed, it is shocking to the moral sense that upon the evidence in this case it should be even suggested that there was any fraud on the jurisdiction of the State of North Carolina.

In the body of the opinion, the chief justice, in referring to the difficulty in proving the bad faith of the petitioner in sending the message out of the State, says: "For it would be almost impossible to prove that this was done to evade the State jurisdiction, since no one but the defendant and its agents can know its motive."

Notwithstanding that it would be "almost impossible" to

make proof of any fraudulent motive, the court nevertheless holds that the impossible was accomplished in this case, and that this evidence does show the fraudulent motive of the petitioner in transmitting the message outside the State!

We have already shown the court that the route over which the message was sent was the one that had been in use for more than ten years, and that it was the quickest route by which a message could be sent between Greenville and Rosemary.

Reduced, then, to its last analysis, the Supreme Court of North Carolina upholds the finding of the jury that this method of transmitting the message in question was used in this case for a fraudulent purpose, although the message was sent in the usual and customary way which had obtained for more than ten years, and, above all, was the quickest way in which the message could be despatched.

If this ruling is correct, then it will be permissible for the jury in any other case where the evidence is similar to this to make a similar finding as to fraud, and in this way to put the stigma of fraud upon petitioner and its officers and agents in all such cases. The net result of such a decision would be to compel the telegraph company to send messages on wires wholly within the State, although sending messages in this way would cause great delays and therefore necessarily limit and restrict the use of the telegraph company for transmitting messages.

The absurdity of the suggestion of fraud, in view of the undisputed testimony that this message, sent in 1918, was given the same routing which had been in use *for more than ten years,* is at once apparent when we recall that the act of Congress which is the foundation of the defense, and which caused the Federal to supersede the State rules of law with respect to interstate messages, was not passed until June 18, 1910, and was not held by the Supreme Court of North Carolina to have the effect now universally accorded it until 1917 (Meadows *vs.* Postal Telegraph-Cable Company, 173

N. C., 240). Before the decision of the Meadows case—certainly before the act of Congress itself was passed—there was no conceivable motive, other than that of operating convenience and efficiency, for the transmission of this message outside the boundaries of North Carolina.

Petitioner Complied With the Act of Congress.

We again call attention to the fact that in its answer, the telegraph company expressly sets up the act of Congress approved June 18, 1910, under which the United States entered upon and assumed charge of regulating the field of interstate communication by telegraph, and petitioner set up that it had complied with said act. It is only necessary to refer the court to the statement made in the plaintiff's case on appeal (Rec., p. 14), where this stipulation appears:

> "It is agreed that the defendant has in all respects complied with the rules and regulations of the Interstate Commerce Commission under act of Congress and amendments thereto regulating interstate communication by telegraph."

The attention of the court is also called to the defendant's tariff book, which appears in evidence as Defendant's Exhibit C in defendant's statement of case on appeal (p. 14) and also to the Defendant's Exhibit D (p. 51), showing copy of a blank form of telegram, showing on the back the rules and regulations for transmitting messages; and at the bottom of page 53 of the record of defendant's appeal, it is stated: "The original telegram marked Exhibit A is on a form similar to the blank form marked Exhibit D with the same terms and rules on the back thereof." It is admitted that the message in question was an unrepeated message.

Under this evidence we submit that in no event could there have been a recovery for more than the tolls actually paid for the transmission of the message, that being the limit of re-

covery in the case of unrepeated messages. In this case, however, the suit is brought by the sendee, who paid no tolls, the same having been paid by the sender. Besides that, the plaintiff in this case does not seek to recover anything except damages for mental anguish, and if this is held by the court to be an interstate message, then there can be no recovery whatever.

ARGUMENT.

A Federal question is undeniably involved in this case arising out of the fact that it is admitted in the pleadings and shown by all of the evidence that the message in question was transmitted through the States of North Carolina and Virginia, and the defendant expressly set up in its answer that the transmission of the message in question constituted interstate commerce. The trial judge in the court below sustained the contention of petitioner and dismissed the case, but on appeal the Supreme Court of North Carolina by a divided court held that the message was intrastate commerce because of the fact that it originated at one point in the State and was destined for another point in the same State and could have been transmitted over wires wholly within the State.

The only damage which the plaintiff sought to recover in the court below was compensation for mental anguish, which it was alleged that she suffered on account of inability to attend her brother's funeral. Counsel for respondent admits, as we understand it, that if the message in question is an interstate message, then no recovery for mental anguish can be had.

Besides that, it is admitted in the answer that the message is an unrepeated message and sent subject to all of the stipulations with reference to unrepeated messages, one of them being that no recovery can be had on account of failure to transmit an unrepeated message beyond the tolls paid.

The opinion of this court in the case of Postal Telegraph Co., petitioner, *vs.* Warren-Godwin Lumber Co., 251 U. S.,

27, decided December 8, 1919 (Supreme Court Advance Opinions, No. 4, page 95), and the opinion of this court in the later case of Western Union Telegraph Company, plaintiff in error, *vs.* Peter Boegli, 40 Sup. Ct. Rep., 167 (not yet officially reported), decided January 12, 1920, hold that the stipulations in regard to unrepeated messages are binding in all cases where the transmission of the message constitutes interstate commerce.

The sole question, then, before the court in this case is as to whether the message in question, transmitted from one point in the State of North Carolina over wires and through relay stations in the State of Virginia and back to another point in North Carolina, constitutes interstate commerce.

The opinion of the Supreme Court of North Carolina shows that the court has disposed of every question involved in the case. The opinion concludes with the words:

> "Judgment should be entered in favor of the plaintiff and the case must be remanded for that purpose."

There was nothing left for the discretion of the trial court, and it can do nothing except to obey the mandate of the Supreme Court of North Carolina and enter judgment for the plaintiff.

When the court of last resort of a State disposes of all the questions in a case and remands it with specific instructions to the lower court to enter judgment, this constitutes a final judgment within the meaning of section 237 of the Judicial Code as amended (Sec. 1214 of U. S. Compiled Statutes).

Rio Grande Railway Co. *vs.* Stringham, 239 U. S., 44, and cases therein cited.

No Recovery for Mental Anguish on Interstate Message.

We understand that counsel for the respondent concedes that if the court should hold that the telegram in question

constitutes interstate commerce, there can be no recovery of damages arising out of mental anguish.

In the case of Southern Express Co. *vs.* Byers, 240 U. S., 612 (writ of error to the Supreme Court of North Carolina), the very question before the court was whether there could be any recovery of damages for mental anguish where there was no injury to person, property, health, or reputation. Mr. Justice McReynolds, speaking for the court, said:

> "The action is based upon a claim for mental suffering only; nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery. The decisions to this effect 'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.' Cooley on Torts (3d ed.), p. 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in so doing we think that they were clearly right upon principle and also in accord with the great weight of authority."

This would seem to be conclusive of the question, and we may add that it has been accepted as conclusive by all of the courts that have passed upon the question.

In Norris *vs.* Telegraph Co., 174 N. C., 92, decided by the Supreme Court of North Carolina in September, 1917, the Supreme Court of North Carolina, after quoting the above passage from the opinion of this court, said:

> "While in intrastate cases, our decisions to the contrary will stand unaffected by the Byers case, unless they are reversed by this court, we are bound to follow the highest Federal court, because it is our duty to do so by the terms of our Constitution (Art. I, secs. 3 and 4), the Federal law, when applicable, being the supreme law of the land. We, therefore, in construing a Federal law, follow the decisions of the highest court in that jurisdiction, and do this, al-

though we may radically differ with that court in its reasoning and conclusion. It follows our decisions in the construction of our Constitution and statutes, and has said that it will do so 'however absurd and illogical' those decisions are in their opinion; and we apply the same rule conversely, not meaning to use any harsh or discourteous language in doing so, for we entertain great respect for the highest tribunal in our land, and will restrain ourselves within bounds of strict propriety and courtesy in referring to it or any other court.

"Following the Federal rule, we must hold, that as this is an interstate message, the plaintiff is not entitled to recover damages for mental anguish resulting from the defendant's negligence in not delivering the message in question."

We also refer to the other decisions that are cited in this brief, many of which are what are denominated mental anguish cases, and in all of them it is held that no damages for mental anguish can be recovered arising out of alleged negligence in the transmission of an interstate message.

Opinions of This Court Decisive of Question.

It is respectfully submitted that the question raised in this case has already been foreclosed in this court in favor of the petitioner.

In the early case of Western Union Telegraph Co. *vs.* Texas, 105 U. S., 460, this court held that a telegraph company transmitting messages occupied a position similar to that of a common carrier of goods. More recently, that is, in 1910, Congress passed an act by which the Federal Government entered upon and took complete control and exercised complete power over telegraph companies as to their interstate business and contracts. That the transmission of telegrams, where the same are sent over the wires of two or more States, constitutes interstate commerce, cannot be ques-

tioned, particularly since the very recent decisions of this court in the cases of Postal Telegraph Co. *vs.* Warren-Godwin Lumber Co., *supra*, and the Western Union Telegraph Co. *vs.* Boegli, *supra*.

Treating as complete the analogy between common carriers of freight and telegraph companies where both do an interstate business, it would seem to follow as a logical and irresistible conclusion that the decisions of this honorable court with respect to what constitutes interstate commerce as applicable to common carriers, would likewise be applicable to the transmission of telegraph messages. In Hanley *vs.* Kansas City Southern Railway Co., 187 U. S., 617, this court, through Mr. Justice Holmes, rendered an opinion concurred in by all the members of the court, which has become the leading case upon the question. In the Hanley case the court, referring to an earlier opinion and citing it with approval, said:

> "To bring the transportation within the control of the State as part of tis domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

This court held in the Hanley case that a shipment originating in Arkansis destined for another point in the same State, but passing over a route outside the State of Arkansas, constituted interstate commerce.

But, if possible, the very recent decisions of this court in the two telegraph cases above referred to make the position of this court clearer still upon the very question involved in the case at bar. In the case of Postal Telegraph Co. *vs.* Warren-Godwin Lumber Company, this court cited with approval a large number of decisions from State courts with respect to the transmission of telegrams through two or more States and holding that this constitutes interstate commerce. Several of these decisions so cited by this court refer to telegrams originating in one point and destined to another point

in the same State. We deem it necessary here to call attention to only one of these cases cited by this court, viz., Western Union Telegraph Company *vs.* Lee, 174 Ky., 210 In this Kentucky case the telegram in question was sent from Lebanon, Ky., to Mayfield, Ky., but was transmitted through Louisville and Nashville, the usual route. The Court of Appeals of Kentucky reviewed all the authorities in a carefully considered and elaborate opinion, and among other cases cited with approval Western Union Telegraph Company *vs.* Bolling (Va.), 120 Va., 413; 91 S. E., 154, and Western Union Telegraph Company *vs.* Mahone (Va.), 120 Va., 422; 91 S. E., 157. After citing these and other cases the Court of Appeals of Kentucky said:

> "And, since a telegraph company carrying messages occupies the same relation to commerce as a carrier of goods (W. U. Tel. Co. *vs.* Texas, 105 U. S., 460; 26 L. Ed., 1067), it would seem to necessarily follow that the principle announced in the Hanley case must be applied here, since the passage of the act of 1910; and that the message sent by Lee constituted interstate commerce. It was so held under precisely similar states of fact in the cases of Kaufman, Bolling, and Mahone, above cited. Messages sent from one point within a State to another like point, but passing through a portion of another State while in transit, have always been interstate telegrams. But before Congress took control of interstate telegrams State laws could incidentally affect them; since the act of 1910, they cannot. The whole subject of interstate telegrams, including the terms of the contract and the character of the recovery, are now controlled by the Federal law; and, as above shown, Lee's telegram was an interstate telegram."

The court's attention is now especially called to the fact that in the case of Western Union Telegraph Company *vs.* Boegli, decided January 12, 1920, this court, through Mr. Chief Justice White, referring to the cases cited in the former

opinion in Postal Telegraph Co. *vs.* Warren-Godwin Lumber Co., says:

> "Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert State power after the passage of the act of 1910 were disapproved and various decisions of State courts of last resort to the contrary, one or more dealing with the subject now in hand, were *approvingly cited.*" (Italics ours.)

It here distinctly appears that the case of Western Union Telegraph Co. *vs.* Lee was "approvingly cited" by this court. It cannot be doubted but that this court carefully considered that opinion and approved its reasoning and its conclusion, and it would seem hardly necessary to go any further with this argument.

If it be suggested here that the finding of a jury to the effect that the transmission of the message outside the State was done for the purpose of fraudulently evading the State law, differentiates the case at bar from the case cited, we need only refer to the decision of this court in the case of Kirmeyer *vs.* State of Kansas, 236 U. S., 568, in which this court, speaking unanimously through Mr. Justice McReynolds, held that a purpose to avoid the consequences of the statutes of a State did not suffice to change the nature of the transaction—that is to say, that the motive which actuates a shipper would not render his business intrastate which would otherwise be interstate commerce. In the Kirmeyer case the Supreme Court of Kansas had held that the act of Kirmeyer in shipping the goods in question in the manner in which he did was a fraud on the jurisdiction of the State, but this view did not prevail with this court.

The evidence in this case shows that there was absolutely no purpose to evade the State law, fraudulent or otherwise, but conceding that there was, the decision of this court in the Kirmeyer case holds out and out that that would have no

bearing upon the decision of the question as to whether the message in question constituted interstate commerce.

However, if we should disregard all of these decisions of this court, and ask this court to consider the question in the case at bar *de novo*, the conclusion in favor of the petitioner's contention is equally irresistible.

The Act of Congress of 1910.

The material part of section 1 of the act of Congress, approved June 18, 1910, as it read when the message of this case was transmitted, and before the amendments of 1920, was as follows:

> "Section 1. The provisions of this act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless), engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning * * * of this act * * *, provided, however, that the provisions of this act shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

It is apparent from this act that Congress well understood that messages from and to points within the same State were often *transmitted* over wires and through relay stations in other States, and the language of the act is carefully worded so as not to have the effect to make such messages intrastate messages. The act says: "PROVIDED, HOWEVER, THAT THE PROVISIONS OF THIS ACT SHALL NOT * * * APPLY TO THE TRANSMISSION OF MESSAGES WHOLLY WITHIN ONE STATE." Here it is plain that under the act of Congress, the manner of the

transmission of the message controls the question as to whether the message comes within the purview of the Federal statute.

We call attention here to the fact that the Court of Appeals of Kentucky in the case of Western Union Telegraph Co. *vs.* Lee, 174 Ky., 210 (192 S. W., 70), already cited, alludes to this significant fact, viz., that the act of Congress refers to the transmission of messages wholly within one State. The court says: *"But the statute in the exempting clause speaks of messages 'transmitted' wholly within one State."* (Italics ours.)

In this connection also we cite the case of Berg *vs.* Western Union Telegraph Co., 110 S. C., 169; 96 S. E., 248, decided by the Supreme Court of South Carolina in June, 1918, in which that court held that a telegram transmitted from one point in a State through a relay point outside the State to another point in the State where the message originated, was an interstate message and governed by the Federal law pertaining thereto. The Supreme Court of South Carolina, referring to the proviso in the act of Congress above quoted, says:

> "The words in the proviso to section 1 of the Interstate Commerce Act, 'that the provisions of this act shall not apply to the transportation of passengers or property * * * wholly within one State,' etc., and the words 'nor shall they apply to the *transmission* of messages by telegraph, telephone, or cable, *wholly within one State,*' etc., were intended to declare that the transportation or the transmission which was only partly within a State should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities used in the transportation or transmission, located in a particular State, can be subjected to the legislation of that State, but not of any other State. *No other reasonable construction can be placed on that section.*" (Italics ours.)

Prior to this act of Congress, there were cases in which the courts held that messages from and to points in the same

State, transmitted outside the State, did not constitute interstate commerce. Of this character is the opinion quoted from at length by Chief Justice Clark in the case at bar, rendered by the Supreme Court of Virginia in Telegraph Co. *vs.* Reynolds, 104 Va., 109, and the later case also of Telegraph Co. *vs.* Hughes, 104 Va., 240. The telegrams in both of these cases arose prior to the act of 1910. It will appear presently from the citations below that the Supreme Court of Virginia, since the passage of the act of 1910, has ruled most emphatically that a message transmitted in the manner that the message in the case at bar was sent is an interstate message and controlled by the Federal law. It is significant also that the Supreme Court of Missouri, as will appear by citations below, now holds with our contention. The Missouri court, in Davis *vs.* Telegraph Co., 198 Mo. App., 692; 202 S. W., 292, referring to a former opinion, said:

> "We were in error in deciding Hewitt *vs.* Telegraph Co., 172 Mo. App., 272; 157 S. W., 827, by reason of our failing to note that the decisions we relied upon were made under the law as it was before June 18, 1910, when Congress placed telegraph companies under Federal regulation."

The case of Western Union Telegraph Company *vs.* Mahone, *supra,* was decided by the Supreme Court of Virginia in January, 1917. This was cited with approval in the Kentucky case, which this court approved, as above shown. In this case the message was sent from Norfolk, Va., to Tye River, in the same State, but was relayed through the city of Washington. It developed in the evidence that it was possible to send the message wholly within the State of Virginia, and it is apparent from the opinion of the court that counsel for the plaintiff relied upon the same course of reasoning upon which is based the opinion of the court in the case at bar. The Supreme Court of Virginia, however, held that the court had nothing to do with motives, but only with facts, *i. e.,* only with the question as to whether the message was

actually transmitted through another State. The Supreme Court of Virginia said:

> "The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives. A local dealer in intoxicating liquors, who lived in the State of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri River, which was connected by a bridge with Leavenworth, Kansas, transacted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the Missouri River in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The State of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying: 'The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from Austin *vs.* Tennessee, 179 U. S., 343; 21 Sup. Ct., 132; 45 L. Ed., 224, and Cook *vs.* Marshall County, 196 U. S., 261; 25 Sup. Ct., 233; 49 L. Ed., 471. Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State, suffice to change the nature of the transactions.' Kirmeyer *vs.* State of Kansas, 236 U. S., 568; 36 Sup. Ct., 419; 59 L. Ed., 721."

We refer the court also to the case of Western Union Telegraph Company *vs.* Bowles, — Va., —; 98 S. E., 645 (not yet

officially reported), decided by the Supreme Court of Virginia on March 13, 1919. In that case a message was received at Bassett, Va., destined to Martinsville, Va. The message in question was transmitted from Bassett *through the Martinsville office* (the point of destination) first to Richmond, Va., and thence it was sent over another direct wire running through two North Carolina offices before getting to Martinsville. The agent at Bassett testified that the message could have been sent direct to Martinsville. The Supreme Court of Virginia, referring to the Mahone case, *supra*, said:

> "It was contended in the Mahone case, as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this court held, upon authority, that the interstate character of the message must be tested by the actual facts as to its transmission, and not by the motives of the company; and, further, as necessary corollary from the decision in the Bolling case, that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of Federal control."

In the case of Taylor *vs.* Telegraph Co., 199 Mo. App., 624; 204 S. W., 818, the Supreme Court of Missouri had before it the liability of the company upon a telegram sent from Kansas City, Mo., to Triplett, Mo., and the message was relayed through Omaha, Neb. The plaintiff's evidence, however, showed that there was a wire running from Kansas City to Brunswick, Mo., and from Brunswick to Triplett, "that the operator at Brunswick could turn around in his chair and telegraph the message from Brunswick to Triplett, and that a message could also be sent to Chillicothe, Mo., and from thence telegraphed to Triplett." Here, then, it appears that the telegraph company had three ways to send the message—two ways over wires wholly within the State of Missouri

and one over a wire relayed at Omaha, Nebraska. The message was actually sent through Omaha, Nebraska, and the court held as a matter of law that the actual transmission of the message through two States constituted interstate commerce. The plaintiff's counsel took the position that the sending of the message through Omaha was to evade the law of the State of Missouri. The court said:

> "Defendant urges that the message was interstate commerce, and therefore not subject to the regulations of this State. Plaintiff urges that it would have been more convenient for defendant to have sent the message through Brunswick or Chillicothe to Triplett than through Omaha to Triplett, and that at any rate the sending of the message outside the State was evidence of an effort to make it interstate commerce, and to thus evade the laws of this State.
>
> "We have carefully examined the record, and we do not find that there was any evidence that it was less convenient or took any greater time to send the message by Omaha than by way of Brunswick or Chillicothe. We do not attempt to say that defendant could avoid the effect of the penalty provided in the statute by purposely sending the message outside of the State in an effort to make it interstate commerce. This case does not present a situation of that kind. The evidence shows that defendant had a choice of two ways of sending the message, one as convenient as the other and requiring as little time as the other, and therefore as direct as the other. There is nothing in the evidence from which a court or jury could say that defendant was attempting to avoid the statute mentioned. We could not go to the extent of holding that where a company has two routes over which a telegram could be sent, one an intrastate and the other an interstate route, each of equal convenience and requiring the same time, and therefore as direct, it must send the message over the intrastate route, and not the interstate route, and that a failure to send it over the former is evidence of an intention to avoid the State statute. Of course, the fact that the origin and

destination of the message were in the State of Missouri did not make the message an interstate one, when its course or route took it outside of the State." Citing numerous cases.

In the case of Kirmeyer *vs.* State of Kansas, 236 U. S., 568, already referred to, the contention was made that because the shipper in that case could have more easily carried on his transactions wholly within the State of Kansas, the "mere adoption of cumbersome and expensive methods" of shipment through two States, rendered the business intrastate, but this court repudiated this contention, and referring to the test as to whether the shipment was interstate or intrastate, the court said:

"That must be tested by the actual transaction."

In addition to decisions of courts of last resort of the several States mentioned above, we would refer the court to decisions emanating from the States of Oklahoma and Kansas.

In Western Union Telegraph Company *vs.* Kaufman, 162 Pac., 708 (not yet officially reported), decided by the Supreme Court of Oklahoma in January, 1917, there will be found a review of all of the decisions, and the court held in a well-considered opinion that a message sent from Apache, Oklahoma, to Henrietta, Oklahoma, but relayed through Wichita, Kansas, constituted interstate commerce.

In the case of Klippel *vs.* Western Union Telegraph Company, 186 Pac., 993 (not yet officially reported), decided by the Supreme Court of the State of Kansas within the last few months, the court held that a message sent from Greensburg, Kansas, to Hutchinson, Kansas, but relayed through Kansas City, Missouri, was an interstate message, and the rights of the parties were governed by the Federal statutes and decisions.

In the case of Western Union Telegraph Company *vs.*

Bushnell, 128 N. E., 49 (not yet officially reported), the Supreme Court of Indiana had the question at issue before it, and after reviewing the authorities and considering the act of Congress, the court held that a telegram originating at one point in Indiana and destined to another point in the same State but actually transmitted through the relay office at Chicago, Illinois, was an interstate message and that (following W. U. *vs.* Boegli) there could be no recovery for a statutory penalty imposed by the legislature of the State of Indiana.

It will thus be seen that every appellate court save only that of the State of North Carolina that has been called upon to pass on the precise question presented to the court in this case, has held that a message transmitted in the manner in which the message in the case at bar was transmitted constitutes interstate commerce.

All Other State Decisions Support Our Contention.

For the convenience of the court, we give below the States that have passed upon the precise question at issue, and have upheld our views:

Kentucky:

W. U. Tel. Co. *vs.* Lee, 174 Ky., 210 (192 S. W., 70).

South Carolina:

Berg *vs.* W. U. Tel. Co., 110 S. C., 169 (96 S. E., 248).

Missouri:

Taylor *vs.* Tel. Co., 199 Mo., 624 (204 S. W., 818).

Virginia:

W. U. Tel. Co. *vs.* Mahone, 120 Va., 422 (91 S. E., 157).

Oklahoma:

W. U. Tel. Co. *vs.* Kaufman, — Okla., — (162 Pac., 708).

Kansas:

Klippel *vs.* W. U. Tel. Co., — Kan., — (186 Pac., 993).

Indiana:

W. U. Tel. Co. *vs.* Bushnell, — Ind., — (128 N. E., 49).

In consideration, therefore, of the Federal statute above quoted and the decisions of this court and the State decisions bearing upon the very question at issue here, the following principles seem clearly established:

1. *In considering whether a shipment of freight by a common carrier or the transmission of a telegram by a telegraph company constitutes interstate or intrastate commerce, the test is the "actual transaction," that is, whether the shipment or the telegram actually passed through two or more States.*

2. *Where a telegraph company operates wires in two or more adjoining States, and is offered for transmission at one station in a State a message destined for another station in the same State, and the message is actually transmitted over wires running through two States, this constitutes interstate commerce, and the fact that the company had the choice of two routes for transmitting the message and might have transmitted it over wires wholly within one State, does not render the transaction one of intrastate commerce.*

3. *If in transmitting such a message over wires running through two States, the telegraph company adopts the route which has been the usual and customary route for the transmission of such messages, then by a stronger token the transmission of the message must be considered interstate commerce.*

4. *The motive of the telegraph company in transmitting the message through two or more States cannot have any weight in determining whether the message is an interstate message or an intrastate message.*

Opinion of North Carolina Supreme Court.

The members of the Supreme Court of the State of North Carolina are much divided in their opinions on the question here presented, and it may be instructive and it is certainly interesting to note the views of the different members of the court as disclosed in the record in this case and also in the later case of Watson *vs.* Telegraph Co., 178 N. C., 471.

In the case at bar the minutes of the Supreme Court (Rec., p. 65) show that Mr. Justice Brown was not present at the hearing and did not participate in the decision.

Mr. Chief Justice Clark delivered an opinion in which Mr. Justice Hoke appears to have concurred.

Mr. Justice Allen dissented.

Mr. Justice Walker, the remaining member of the court, concurred in the result; that is, he concurred in the order of the court directing judgment to be entered in the court below in favor of the plaintiff, but he appears not to have concurred in all the reasoning of the court.

Watson vs. Telegraph Company.

More light is thrown upon the views of the members of the Supreme Court of North Carolina by the opinions in the case of Watson *vs.* Telegraph Co., 178 N. C., 471, decided by that court on November 19, 1919, being the next day after the petition to rehear the case at bar was denied. In the Watson case the message originated at Red Springs, N. C., destined to Greensboro, N. C., but was actually transmitted through the State of South Carolina. The contention was made in that case as in this that the bare fact of transmitting a message through another State when there was an available route wholly within the State of North Carolina, was evidence on the part of the telegraph company of an intent to evade the laws of the State of North Carolina, and the jury in the court below so found.

Upon appeal to the Supreme Court all five of the justices were sitting. An opinion was rendered by Mr. Chief Justice Clark upholding the judgment rendered against the telegraph company in the court below, and upholding the finding that the message was sent outside the State to evade the State law.

This opinion appears to have been concurred in by Mr. Justice Hoke.

Mr. Justice Walker filed a concurring opinion, in which he distinctly states that he did not concur in all the reasoning of the court, but he puts his decision upon the ground that the jury found that transmitting the message through the State of South Carolina was to evade the laws of the State of North Carolina. Mr. Justice Walker is of the opinion that it is necessary to show bad faith, but he holds that the jury is warranted in finding bad faith on the part of the telegraph company in transmitting the message through another State, provided only it appears that there is a route wholly within the State over which the message could have been transmitted.

Mr. Justice Brown filed a sharp dissenting opinion, to which the attention of this court is particularly called, and this dissenting opinion is concurred in by Mr. Justice Allen. The dissenting justices held squarely that where the telegraph company has the choice of two routes, one wholly within the State and one outside the State, if the message is actually transmitted through two States, this constitutes interstate commerce, and that the motive has nothing to do with determining the question.

It is extremely interesting and perhaps important, therefore, to note that the members of the Supreme Court of North Carolina are divided on the question at issue, as follows:

Mr. Chief Justice Clark and Mr. Justice Hoke seem to be of the opinion that where a message originates at one point in the State, destined to another point in the same State, and it is *possible* to send it entirely over wires within the State,

this constitutes intrastate commerce, although the usual and customary method of sending such a telegram was through some relay station outside the State.

Mr. Justice Walker is of the opinion that where a message originates at one point in the State destined for another point in the State but is actually transmitted through a relay station outside the State, this constitutes interstate commerce unless it is shown that sending the message outside the State was for the fraudulent purpose of evading the State law.

Mr. Justice Brown and Mr. Justice Allen hold that if a message originates at one point in the State, destined for another point in the same State, is actually transmitted through a relay station or over wires in another State, this constitutes interstate commerce and the question of motive in sending it outside the State has no bearing upon the question.

Coming back to the opinion of Mr. Chief Justice Clark in the Watson case, it will be seen that the chief justice himself drew a diagram showing the roundabout way in which the message was actually transmitted through the State of South Carolina, and after referring to the fact that the jury had found adequate testimony that the method used was to evade the State law, the chief justice says:

> "But independently of that, under the authority of Speight *vs.* Telegraph Co., 100 S. E., 351, at this term, the court might well have held that, according to the United States Constitution and geography, as a matter of law, the transmission of a telegram between Red Springs and Greensboro was an intrastate transaction."

From this it will appear that it is the opinion of the chief justice of the State, concurred in by Mr. Justice Hoke, that when a case of this character comes before a trial judge and he is called upon to decide whether the message is an interstate message or an intrastate message, *it only requires a knowledge of the Constitution and of geography to determine the question*. If, *geographically* speaking, there was a more

direct route; that is, a shorter route, wholly within the State, then the transmission of the message outside the State becomes *constitutionally* an intrastate message. The deduction is that the court and the jury have nothing to do with relay stations, with the customary method of transmitting such telegrams, nor with the further question as to whether the telegram was transmitted over the quickest route.

In the opinion of the chief justice in the case at bar, he alludes more than once to the roundabout and cumbersome method, as he terms it, adopted by the telegraph company for transmitting the message. The undisputed evidence shows the establishment of relay stations at Richmond and Norfolk and the necessity for them in order to avoid congestion, but this is wholly ignored in the opinion of the chief justice. The primary question seems to be one of distance, and the court seems to hold that the telegram must be sent by the shortest distance. This view ignores the well-known fact that a telegraphic message can be despatched just as quickly over a continuous wire 500 miles as it can over 10 miles, and that the important matter is not a matter of distance, but it is the handling of the message so as to avoid congestion and the adoption of the proper relay stations through which messages can be relayed quickly.

As stated above, the undisputed evidence in this case shows that the message was transmitted in the quickest way that it could have been transmitted, and there was no allegation of any negligent delay in the transmission of the message. If the operator at Greenville had attempted to transmit the message as it is now contended it should have been transmitted, viz., to Weldon, and to have relayed it at Weldon, and this unusual method of transmitting it had caused a delay in the transmission of the message which resulted in damage to the plaintiff, can it be doubted that the plaintiff could have recovered against the defendant for negligent delay in the transmission of the message by showing that if the message had been transmitted in the usual and ordinary way through

the relay points at Richmond and Norfolk, it would have reached its destination very much more quickly?

Rulings of the Supreme Court Unsupported by Evidence.

From the position taken by us it is apparent that under our view of the case most of the evidence in this case was wholly irrelevant and immaterial in determining the question as to whether this was an intrastate or an interstate message. If, however, this court should in any aspect of the case hold that the evidence is material or relevant, then it becomes the duty of this court to examine into the evidence. This court has previously decided that where a Federal right is brought in question, and it is contended that this Federal right is supported by the undisputed evidence in the case, it then becomes the duty of the court to examine into the evidence.

Creswell *vs.* Grand Lodge Knights of Pythias, 225 U. S., 246.

North Carolina Ry. Co. *vs.* Zachery, 232 U. S., 248.

Kinzell *vs.* C., M. & St. P. Ry. Co., decided May 19, 1919, U. S. Adv. Ops., 1918-19, p. 477.

Philadelphia, B. & W. Ry. Co. *vs.* Smith, decided May 19, 1919, U. S. Adv. Ops., 1918-19, p. 497.

In the first part of the opinion of the chief justice in the case at bar, reciting the facts and referring to the points of origin and destination, he says: "Both of these points are in this State and the defendant has a continuous line in this State and in operation from Greenville to Rosemary." In a previous part of this brief we have quoted extracts from the testimony and have shown that by the undisputed evidence there was no such continuous line in operation from Greenville to Rosemary.

In the latter part of the opinion, the chief justice, referring to the order of the trial judge in setting the verdict aside, and referring particularly to the first issue submitted to the jury, which was an inquiry as to whether the message had

been sent out of the State "for the purpose of fraudulently evading liability under the laws of North Carolina, the chief justice says: "There was error in setting aside the verdict; if the first issue had been material, there was evidence to sustain the finding of the jury."

We have in a previous part of this brief shown that there was not the slightest evidence to sustain a finding that there was any fraudulent purpose to evade the State law. As we have already shown, the chief justice himself says in a prior part of the opinion that it is "almost impossible" to prove that a message is sent outside the State for the purpose of evading the laws of the State, and yet in the latter part of the opinion he holds that this fraudulent purpose has been shown by the facts in this case, although as above shown, the undisputed evidence was to the effect that the message was sent in the usual and customary way. Further, as has been already pointed out, any suggestion of fraud becomes mere nonsense when it is considered that by the undisputed evidence this same route for sending messages through Virginia had been adopted and used more than ten years before the sending of this telegram; that is, long prior to the act of Congress that brought about the change in the law and prior to the decision of the Supreme Court of North Carolina in the Meadows case.

Opinion of Chief Justice Based on Overruled Cases.

In the opinion of Chief Justice Clark he relies upon Railroad Co. *vs.* Pennsylvania, 145 U. S., 192; Commissioners *vs.* Telegraph Co., 113 N. C., 122; Seawell *vs.* R. R. Co., 110 Mo., 292; Campbell *vs.* R. R. Co., 86 Ia., 587. Every one of these cases has been distinguished, discredited, or overruled by the opinion of this honorable court in Hanley *vs.* Railroad Co., 187 U. S., 617, and what is more remarkable the Supreme Court of North Carolina, in the case of Shelby Ice & Fuel Co., 147 N. C., 66, refers to the fact that all four of these

cases had been distinguished, discredited, or overruled by the Supreme Court of the United States. Likewise, in the case of Bateman *vs.* Telegraph Co., 174 N. C., 97, the Supreme Court of North Carolina again refers to the fact that the above-mentioned cases were no longer authority upon questions of interstate commerce.

It is still more interesting to note that in the opinion of the chief justice he quotes at length from the opinion of the Supreme Court of Virginia in the case of Telegraph Co. *vs.* Reynolds, 100 Va., 459, and also another opinion from the Virginia Supreme Court, whereas it is shown above that in later cases the Supreme Court of Virginia in the most emphatic manner upholds the contention of the petitioner in the case at bar.

Also the chief justice relies upon an opinion of the Supreme Court of Kansas, in the case of R. R. *vs.* Leibengood, whereas the Supreme Court of Kansas, as shown above, upholds the contention of petitioner.

The chief justice also relies upon several decisions from the Supreme Court of Indiana, whereas the Supreme Court of Indiana, as shown above, upholds the contention of the petitioner.

Conclusion.

In conclusion, we submit that the importance of this case cannot be too much magnified, at least so far as the State of North Carolina is concerned, when this court realizes the scope of the decision of the Supreme Court of North Carolina in the case at bar, and particularly as elaborated in the case of Watson *vs.* Telegraph Company, above referred to. It will be seen that the Supreme Court of North Carolina recognizes that the same law applies to the shipment of freight that does to the transmission of telegrams, and that in either case it is within the province of the court in determining whether a shipment or a telegram is intrastate or interstate commerce, to inquire into the routes over which the shipment

might have been made or the telegram might have been transmitted, and to inquire also into the motives which actuated making the shipment in the particular manner in which the shipment was made, and thus the rights of litigants will be made to depend upon questions which Congress never contemplated should enter into the determination of what constitutes interstate commerce.

Counsel for petitioner respectfully request the court to reverse the ruling of the Supreme Court of North Carolina, and to direct that the case be dismissed in accordance with the ruling of his honor who tried the case before the jury.

Respectfully submitted,

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WATSON v. WESTERN UNION TELEGRAPH CO. (No. 291.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

1. COMMERCE ⟨⟩28 — INTERSTATE MESSAGE NOT RENDERED INTERSTATE BY TRANSMISSION THROUGH ANOTHER STATE.

Where a telegraph company, merely to evade liability under the laws of North Carolina, constantly transmitted messages between two points in the state by routing them through a point in South Carolina, the subterfuge did not render a death message an interstate one to prevent recovery under state law for mental anguish and delay in delivery.

2. TELEGRAPHS AND TELEPHONES ⟨⟩73(1)—BONA FIDES IN ROUTING MESSAGES TO RENDER THEM INTERSTATE A JURY QUESTION.

The fact that defendant telegraph company routed all messages between two points in North Carolina through a point in South Carolina, or Richmond, Va., *held* sufficient evidence for the jury on the question of the good faith of the company in so transmitting messages, material on the point whether they were bona fide interstate, and the telegraph company's liability therefore not controlled by state law.

3. COMMERCE ⟨⟩28—INTERSTATE TRANSACTION NECESSITATED BY CONFIGURATION OF BOUNDARY OR LOCATION OF RAILROAD OR TELEGRAPH LINE "INTERSTATE COMMERCE."

Where the configuration of the state boundary or the location of a railroad or telegraph line necessitates the transportation of freight and passengers or the transmission of messages between two points in the state by the most usual and direct route through another state, the transaction is interstate, and controlled by federal law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

4. EVIDENCE ⟨⟩10(4)—JUDICIAL NOTICE OF STATE LINES AND POINTS WITHIN STATE.

The courts take judicial notice of state lines and the location of points within the state.

Brown and Allen, JJ., dissenting.

Appeal from Superior Court, Guilford County; Lane, Judge.

Action by J. T. Watson against the Western Union Telegraph Company. From judgment for plaintiff, defendant appeals. No error.

This action is to recover mental anguish for delay in delivery of the following message:

"Red Springs, N. C. 5.50 p. m. 31 Oct. 1917
To N. A. Watson, Greensboro N. C.
Wire to Charlie McKnight at Vanstory Cloth-ing Company. Get money. Come to Buie via Red Springs, mother dead. N. A. Watson."

This message, filed at Red Springs 5:50 p. m. October 31, 1917, was received at Greensboro 5:57 p. m. on the same day. The mother of the plaintiff had died on the same day at 2:30 p. m. The telegram was not delivered till about noon November 1st, in consequence of which the plaintiff was unable to get to Red Springs until the morning of November 2d. Verdict and judgment in favor of plaintiff. Appeal by defendant.

King & Kimball, of Greensboro, for appellant.

Chas. A. Hines and C. R. Wharton, both of Greensboro, for appellee.

CLARK, C. J. The chief, if not the sole, question presented by the briefs both of the plaintiff and defendant, and on which this case was tried, is whether this was an interstate message. It was sent from Red Springs, N. C., to Greensboro, N. C., via Bennettsville, S. C. It was in evidence that there were at least four shorter lines of telegraph owned by defendant from Red Springs to Greensboro lying wholly in the state, and over which this message might have been sent, to wit, from Red Springs to Fayetteville, and thence to Greensboro; also from Red Springs to Maxton and from Maxton to Hamlet, and thence either via Raleigh or via Charlotte to Greensboro; and also from Red Springs to Selma, thence to Greensboro. The cross-examination of the defendant's witness showed that telegrams from Red Springs to every point in North Carolina (except to two or three stations between Maxton and Fayetteville) are sent by it over a wire that runs through South Carolina, or are sent to Richmond, Va., and thence back into this state. The plaintiff contended that these facts furnished evidence from which the jury could find that this method was adopted for the purpose of evading liability under the laws of this state, and that such course of business was not established in good faith, and the jury so found.

Exception 5 presents the following question:

"(1) Did his honor err in charging the jury as follows: 'So, if the jury find from the evidence that even if this message came through the state of South Carolina if it was not sent that way in good faith, over the usual necessary way in the transaction of its business, then you will not consider it an interstate message.'"

Exception 11:

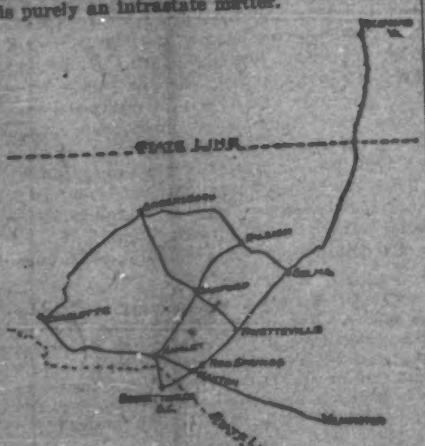
"Was there sufficient evidence to go to the jury that the defendant company acted in bad faith in routing the message out of the state as it did?"

[1, 2] The charge of the court was in line with the decision of this court in Bateman v. Telegraph Co., 174 N. C. 97, 93 S. E. 467,

L. R. A. 1916A, 803. The fact that by the peculiar methods adopted by the defendant all messages from Red Springs to other points in this state (except to two or three points between Maxton and Fayetteville) are sent out of the state to some point in South Carolina or to Richmond, Va., and thence back into this state, was certainly sufficient evidence to be submitted to the jury upon the question of good faith.

So generally has this method been adopted by the defendant that the Legislature of 1919 (chapter 175) passed "An act to prohibit telegraph companies from converting intrastate messages into interstate messages," and provided therein that "proof of the sending of any message from one point in this state to another point in this state shall be prima facie evidence that it is an intrastate message."

[3, 4] There are a few instances where by reason of the configuration of the state boundary or the location of the railroad or telegraph line, the transportation of freight and passengers, or the transmission of a telegram between two points in the same state, by the usual and most direct route, is through another state. In such case it is an interstate transaction. But the courts take judicial notice of state lines and the location of points within the state. Reference to the diagram shows that as a matter of law, as well as of fact, the transportation of freight or passengers or the transmission of telegrams between Red Springs and Greensboro is purely an intrastate matter.



If by the device of sending this message to Bennettsville, S. C., or to Richmond, Va., and thence to Greensboro, this could be made an interstate message it would follow that the state regulation by which 25 cents is the limit for a message of 10 words between two

the telegraph company by its methods of transacting business, with a view of evading our law as to the measure of damages, has also annulled the right of the state to regulate telegraphic charges and all other supervision of any kind whatever by the state over the telegraph company which does business in this state under authority of our laws, and which is protected in its property and as to the persons of its employés at the expense of the taxpayers of North Carolina.

The jury have found, upon adequate testimony, that this method was used to evade the state laws. But independently of that, under the authority of Speight v. Telegraph Co., 100 S. E. 351, at this term, the court might well have held that, according to the United States Constitution and geography, as a matter of law, the transmission of a telegram between Red Springs and Greensboro was an intrastate transaction.

It being in evidence from the defendant's witnesses that there are at least four other shorter routes over which the defendant could have sent this message from Red Springs to Greensboro without sending it to a point in South Carolina, or to Richmond, Va., and thence back into the state, the judge might have instructed the jury, under the authority of Speight v. Telegraph Company, at this term, that irrespective of the question of good faith this, being a message between two points in this state, was an intrastate message, and governed by our laws, both as to charges for transmission and the measure of damages, and that if the defendant, though in good faith, but merely for its own convenience, or according to its peculiar notions of doing business, has seen fit to send it (out of the direct and shortest route) to points out of the state and thence back into the state, it was none the less intrastate commerce.

Unless the judge upon the facts of this case could instruct the jury as a matter of law that this was intrastate commerce, then the state has lost control of the rates and regulations of all interstate commerce, for freight could be thus shipped from Red Springs to Richmond, Va., and thence back to Greensboro and rates charged accordingly and free from any other regulations by the state. This would be true as to all other intrastate commerce.

However, both in this case and the Speight Case, supra, the jury found that it was an intrastate message as a matter of fact.

No error.

WALKER, J., concurs in result. He would add, though, that the case of Bateman v. Western Union Telegraph Co., 174 N. C. 93 S. E. 467, L. R. A. 1918A, 803, is not, his opinion, an authority in favor

...ing, in case of appeal v. Telegraph Co., 100 S. E. 351, at this term.

In the Bateman Case, the message could not be sent directly from Durants' Neck, N. C., to Plymouth, N. C., because there was, at that time, no line between those points, and therefore it had to be transmitted by way of Norfolk, Va. The judge charged the jury in that case as follows:

"If the jury believe the evidence and find therefrom that the message was transmitted in the usual, customary, and necessary route from Hertford, N. C., to Norfolk, Va., and relayed and transmitted from Norfolk, Va., to Plymouth, N. C., then the message would be an interstate message, and as such interstate commerce, and the liability of the defendant is such only as is fixed and determined by the federal law applicable thereto; * * * and mental anguish alone in such a case as this is not recognized by the federal law as an element of damage for which a recovery can be had. * * * Therefore, upon such finding, you will answer the third issue 'Nothing.'"

With reference to this instruction we said:

"This charge, read in connection with the verdict, or the answer to the third issue, excludes the idea of bad faith on the part of the defendant, and goes further, for it establishes the fact that instead of there being any attempt to evade the law, the route selected by the defendant was 'the usual, customary, and necessary one.'"

There was no controversy there as to there not being a line of communication between the initial and the terminal points. It was conceded that there was not, and the only question was whether the necessity of sending out of the state to Norfolk, Va., and from there to Plymouth, N. C., would be interstate commerce, and we held that it would have that effect in law.

In the present case, there is a telegraph line connecting Red Springs, N. C., and Greensboro, N. C., and the jury has found that the defendant sent the message beyond the state, and by a circuitous and roundabout way to Greensboro, N. C., not in good faith, but with the fraudulent purpose of evading the operation of our state laws.

I concur in the result of the decision, but not in all of the reasoning by which it was reached.

BROWN, J. (dissenting). I regret to differ with my Brethren in the disposition of this case, for I realize that there are some cases of this character where telegraph companies should be held to liability for mental anguish under our state law. If this were an open question, I would unhesitatingly agree with my Brethren. But investigation has convinced me that where the telegraph company has the choice of two methods of transmitting a ...gram, one wholly within the state and ... state, and the company chooses to transmit outside the state, the transmission outside the state constitutes interstate commerce.

It has been settled by the Supreme Court of the United States in Hanley v. Railroad, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, that where two points are in the same state, yet if in the transmission by a carrier any part of the route is in another state, it is interstate commerce. To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state. This subject is discussed by Mr. Justice Walker in Bateman v. Tel. Co., 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A, 803. I think it is manifest from the language of the act of Congress of June 18, 1910 (36 Stat. 539, c. 309), that a telegram sent from a point in this state through another state and back into this state is interstate commerce, and comes within the purview of that act. Section 7 of that act, amending section 1 of Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. § 8563) reads as follows:

"The provisions of this act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning * * * of this act: * * * Provided, however, that the provisions of this act shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

The only exception to the provision of that act is to the transmission of messages wholly within one state.

It is plain to me that under the act of Congress the manner of the transmission of the message and route it takes controls the question as to whether the message comes within the purview of the federal statute. This seems to be the view of the Supreme Court of Kentucky in the case of Telegraph Co. v. Lee, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026, in which the court says:

"But the statute in the exempting clause speaks of messages 'transmitted' wholly within one state."

It is also the view of the Supreme Court of South Carolina in Berg v. Tel. Co., 96 S. E. 248, in which the court held that a telegram transmitted through a relay point outside the state to another point in the same state was an interstate message, and governed by the federal law pertaining thereto, and in this connection the Supreme Court of South

Congress above quoted, says:

"The words in the proviso to section 1 of the Interstate Commerce Act 'that the provisions of this act shall not apply to the transportation of passengers or property * * * wholly within one state,' etc., and the words, 'or shall they apply to the transmission of messages by telegraph, telephone or cable, wholly within one state,' etc., were intended to declare that the transportation or transmission which was only partly within a state should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities used in the transportation or transmission located in a particular state can be subjected to the legislation of that state, but not of any other state. No other reasonable construction can be placed upon that section."

See, also, Davis v. Tel. Co., 198 Mo. App. 202, 202 S. W. 292; also Tel. Co. v. Mahone, 120 Va. 422, 91 S. E. 157. In this case the message was sent from Norfolk, Va., to Tye River, in the same state, but was relayed through the city of Washington. It developed in the evidence that it was possible to send the message wholly within the state of Virginia, and it is apparent from the opinion of the court that counsel for the plaintiff relied upon the same course of reasoning upon which is based the opinion of this court. The Supreme Court of Virginia, however, held that the court had nothing to do with motives, but only with facts; i. e., only with the question as to whether the message was actually transmitted through another state. The Supreme Court of Virginia said:

"The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts, and not inquire as to motives. A local dealer in intoxicating liquors, who lived in the state of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri river, which was connected by a bridge with Leavenworth, Kan., conducted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the river in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The state of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention saying:

"'The Supreme Court of the state gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, and Cook v. Marshall County, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471. Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the state, suffice to change the nature of the transactions.' Kirmeyer v. State of Kansas, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. Ed. 721."

I am driven to the conclusion that where a message is actually transmitted through another state, although the point of origin and the point of destination are both within the same state, such message constitutes interstate commerce, irrespective of the motive which prompted the company in sending the message outside the state. I think it plainly deducible from the language of the Supreme Court of the United States in Kirkmeyer v. State of Kansas, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. Ed. 721, quoted and commented on by the Supreme Court of Virginia in Telegraph Co. v. Mahone, supra. See, also, Tel. Co. v. Boles (Va.) 98 S. E. 645, decided March 13, 1919. In that case the Supreme Court of Virginia, referring to the Mahone Case says:

"It was contended in the Mahone Case, as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this court held, upon authority, that the interstate character of the message must be tested by the actual facts as to its transmission, and not by the motives of the company; and, further, as a necessary corollary from the decision in the Bolling Case, that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of federal control."

See, also, the opinion of the Court of Appeals of Missouri in the case of Taylor v. Tel. Co., 199 Mo. App. 624, 204 S. W. 918.

Under these authorities and others which can be cited, I am convinced that where it appears that the message was transmitted over wires running through more than one state, the fact itself is controlling, and the court cannot go into the questions of the motives of the company, although it may appear that there were routes wholly within the state over which the message might have been sent. There is no statute in North Carolina which makes it compulsory upon telegraph companies doing business within this state to transmit messages to points within the state over wires wholly within the state, and until such statute is enacted, I see no way by which telegraph companies can be restricted in the manner in which they shall transmit the messages of their customers. It must be admitted that the only duty the telegraph company owes to the customer is to transmit his message accurately and with celerity. If it can perform this duty as well by using one wire as another, it

follow any way by which its service can be interfered with. I am not at all alarmed at the suggestion that the telegraph companies, by routing intrastate messages out of the state, can avoid the rate fixed by the state for such business. The state has the undenied right to fix the rate for transmitting messages between points in the state, provided the rate is reasonable and not confiscatory. This has been acquiesced in by the telegraph companies for many years, and it is too late now to question the power. By routing the message on wires running into an adjoining state and back into this state, the company cannot evade the state law fixing rates, as long as it continues to do business in the state. The difference is this: There is a law fixing rates within the state on intrastate messages, but there is no statute requiring such message to be transmitted over wires wholly within the state. Therefore the company can transmit them over any lines it sees fit if it discharges fully its duty to the patrons.

I admit that the decision of the court in this case comes within the authority of Speight v. Tel. Co., 100 S. E. 351, at this term. I was not present when the Speight Case was decided, and take this opportunity to express my views, with the purpose hereafter to cheerfully acquiesce in the judgment of my Brethren.

ALLEN, J., concurs in this opinion.

RITCHARD et al. v. WILLIAMS. (No. 9.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

IMPROVEMENTS ⇐4(6)—"PERMANENT IMPROVEMENT."

What are "permanent improvements" is a mixed question of law and fact, depending largely upon the circumstances of each case, and improvements which might be deemed permanent in certain surroundings would be of no value in other circumstances because unsuitable for the ordinary use of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permanent Improvement.]

APPEAL AND ERROR ⇐863(1)—MATTERS CONSIDERED ON APPEAL FROM JUDGMENT DISMISSING PETITION FOR BETTERMENTS.

In action for possession of land, question as to restrictions or enlargement of damages and rental values under Revisal 1905, § 654, by reason of defendant's life estate cannot be raised on appeal from judgment dismissing defendant's petition for betterments.

APPEAL AND ERROR ⇐843(1) — INSTRUCTION TO TRIAL COURT ON REMAND.

It would be supererogation for Supreme Court, in setting aside judgment dismissing petition for betterments and remanding case with instructions to submit proper issues to jury, to instruct lower judge on a matter as to which his ruling may be satisfactory on the trial, if upon the evidence a ruling should be called for.

Allen, J., dissenting.

Appeal from Superior Court, Camden County; Bond, Judge.

On petition for rehearing. Petition dismissed.

For former opinion, see 176 N. C. 108, 96 S. E. 733.

Aydlett, Simpson & Sawyer, of Elizabeth City, R. C. Dozier, of South Mills, and Ehringhaus & Small, of Elizabeth City, for appellant.

D. H. Tillett, of South Mills, and Meekins & McMullan, of Elizabeth City, for appellees.

CLARK, C. J. This is a petition to rehear the well-considered opinion 176 N. C. 108, 96 S. E. 733, delivered by Brown, J., for a unanimous court at fall term, 1918.

After the fullest consideration, we think that our former opinion should be adhered to in every respect and for the reasons therein so convincingly set forth. Issue 3 suggested in the addenda to that opinion, "What is the value of such permanent improvements?" we think might be extended in accordance with the provisions of Rev. § 655, to read, "To what amount is the value of the premises increased by such permanent improvements?" though doubtless the trial judge would, without this suggestion, have instructed the jury that such was the meaning of this suggested issue.

[1] Under the provisions of Rev. § 494, the plaintiff filed in this cause a bill of particulars as to the permanent improvements for which he sought compensation. We do not think that in this case, in which we have reversed the nonsuit below, we need pass upon what are and are not permanent improvements. What are "permanent improvements" is a mixed question of law and fact, depending largely upon the circumstances of each case, and the instructions of the court, if excepted to, will come up on appeal. Some improvements which might be deemed permanent in certain surroundings would be of no value in other circumstances because unsuitable for the ordinary use of the property.

The measure of compensation is nowhere better discussed than in 14 R. C. L. p. 25, § 15, in the course of which it is said:

"The measure of compensation is not the original cost of the improvements, but the actual enhancement in the value of the land by reason of the improvements made thereon."

[2, 3] The question raised in the plaintiff's brief as to the restriction or enlargement of

damages and rental values (Rev. § 654) by reason of the life estate may or may not arise on the trial. It is not, and cannot be, presented by this appeal, and it would be supererogation to instruct the judge below upon a matter as to which his ruling may be satisfactory on the trial, if upon the evidence a ruling should be called for.

Petition dismissed.

ALLEN, J. (dissenting). When the former appeal in this action was before the court, we said:

"The verdict, when considered in connection with the charge, also establishes that neither the defendant nor any one under whom he claims is a purchaser for value." Pritchard v. Williams, 175 N. C. 221, 95 S. E. 571.

We must then deal with the defendant as a volunteer, and not as a purchaser.

The defendant admitted while a witness in his own behalf that he was told before he bought he would buy a lawsuit, and he said he made no further inquiry.

I understand the law to be as stated in Ijames v. Gaither, 98 N. C. 361, and many other cases, that—

"Whatever is sufficient to put a party on inquiry, he is presumed to have notice of every fact and circumstance which a proper inquiry would enable him to find out. 1 Story's Jurisp. § 400; Blackwood v. Jones, 4 Jones Eq. [57 N. C.] 54."

The party who told the defendant he would buy a lawsuit is the one by whom the trust was established, and the defendant on his own admission could have learned of the rights of the plaintiffs by a simple inquiry, and, if so, the law says he took his deed with notice of the trust.

"This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by Ashe, J., in the case of Wharton v. Moore, 84 N. C. 482 [37 Am. Rep. 627], as follows: 'This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and, while it has been adopted in many of the states, it is not recognized in others. But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity.' Here it will be noted that the claimant must be an innocent person, and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith—that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner." Alston v. Connell, 146 N. C. 58 S. E. 442.

It also appears that the defendant was the owner of a life estate at the time he made the improvements, and—

"It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements, nor can a charge upon the lands or the inheritance be made for such improvements; it being generally held that a life tenant does not come within the purview of the betterment or occupying claimant's acts. The reasons for this rule are that the life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire, and also that improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman. Mere knowledge on the part of the remainderman that improvements are being made and passive acquiescence therein are not sufficient to charge him with the cost thereof." 17 R. C. L. 6[illegible]

Smith, C. J., said in Merritt v. Scott, [illegible] N. C. 287:

"We think it clear that improvements of any kind put upon land by a life tenant during his occupancy constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state without deduction for its increased value by reason of good management or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority."

This rule has only been relaxed in favor of a purchaser who made the improvements in good faith under a deed purporting to convey the fee, which he accepted under the advice of learned counsel (Falson v. Kelly, 143 N. C. 285, 62 S. E. 1086), and not in behalf of one who is not a purchaser for value, and who took his deed with notice of the trust